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No. 07-__ 07-669

IN THE

Supreme Court of the United States

HARDING GLASS COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED FOR REVIEW

1. Where the National Labor Relations Board took fourteen years to resolve unfair labor practices charges and where the Board rejected a negotiated settlement that would have resolved the dispute to the satisfaction of all parties years earlier, was the Board's order requiring Petitioner to pay interest for the entire period "punitive" and "confiscatory" within the meaning of this Court's decision in *NLRB v. International Association of Bridge, Structural & Ornamental Ironworkers,* 466 U.S. 720 (1984)?

2. The second question presented—on which the Circuits have split—is whether employers may apply payments they have made to alternative benefit plans as an offset against an order of the NLRB to pay withheld funds to union benefit funds?

CORPORATE DISCLOSURE STATEMENT

Harding Glass Company, Inc. is a privately-held company with no corporate parent, and no publicly held company owns 10% or more of its stock.

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IN THE

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No. 07-___

HARDING GLASS COMPANY, INC.,
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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the First Circuit

PETITION FOR A WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the United States Court of Appeals for the First Circuit dated August 17, 2007 is reported at 500 F.3d 1 and is reprinted in the Appendix (App.) at 1a. The Supplemental Decision and Order of the National Labor Relations Board dated August 29, 2006 that was enforced by the First Circuit is reported at 347 N.L.R.B. No. 102 and is reprinted in the Appendix at 19a. The Supplemental Decision of the Administrative Law Judge dated June 29, 2005 that was affirmed and adopted by the NLRB is reprinted in the Appendix at 40a. The decision of the United States Court of Appeals for the First Circuit dated March 27, 1996, partially granting and

partially denying enforcement of the Board's original order finding that Harding Glass Company had engaged in unfair labor practices is reported at 80 F.3d 7 (1st. Cir. 1996) and is reprinted in the Appendix at 51a. The Board's Supplemental Decision striking Petitioner's affirmative defenses is reported at 337 N.L.R.B 1118 and is reprinted in the Appendix at 162a. The Board's original Decision and Order dated March 31, 2005 modifying but upholding the Administrative Law Judge's decision that Harding Glass Company had engaged in unfair labor practices is reported at 316 N.L.R.B 985 and is reprinted in the Appendix at 62a. Finally, the Administrative Law Judge's original Decision and Order dated November 3, 1994 finding that Harding Glass Company had engaged in unfair labor practices is reprinted in the Appendix at 93a.

BASIS FOR JURISDICTION

Petitioner seeks review of a judgment of the United States Court of Appeals for the First Circuit, dated August 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent statutes, Sections 8 and 10 of the National Labor Relations Act, 29 U.S.C. §§ 158 and 160, are lengthy and therefore are not reprinted here. The statutes are reprinted in the Appendix at 136a.

STATEMENT OF THE CASE

Petitioner is a small business located in Worcester, Massachusetts. It specializes in auto glass replacement and small glass-related construction projects. It employs five people full-time and two people part time.

In November 1993, the Union filed charges of unfair labor practices. The Board filed its complaint against Petitioner in February, 1994. A trial was held before the Administrative Law Judge on July 13 and 14, 1994 and the ALJ issued his decision in November 1994. *Harding Glass Company, Inc.*, 1994 NLRB LEXIS 896. (App. 136a.) Both parties filed exceptions, and on March 31, 1995, the Board affirmed and adopted the ALJ's decision. 316 N.L.R.B. 985. (App. 62a.) The Board then applied to the First Circuit Court of Appeals for enforcement of its order and, on March 27, 1996, the Court of Appeals issued an order granting enforcement in part and denying enforcement in part. *NLRB v. Harding Glass Co.*, 80 F.3d 7 (1st Cir. 1996) (App. 59a.)

More than a year later, on July 1, 1997, the Board issued a Compliance Specification and set the matter for hearing on November 4, 1997. The compliance specification covered the period from October 25, 1993 through October 26, 1996. It provided for payments in the following approximate amounts, plus interest:

Back pay (5 employees): $26,500
Health & Welfare Fund: $24,700
Pension Fund: $12,000
Annuity Fund: $11,500
Apprenticeship Fund: $450

Petitioner answered the Compliance Specification on July 22, 1997. Thereafter, the Board postponed the compliance hearing and nothing further happened until the Board issued an Amended Compliance Specification two and a half years later, on January 20, 2000. The Amended Compliance Specification covered the period from October 25, 1993

through July 1999, and provided for payments in the following approximate amounts, plus interest:

Back Pay (10 employees): $103,000
Health & Welfare Fund: $109,000
Pension Fund: $52,700
Annuity Fund: $50,400
Apprenticeship Fund: $2500

Petitioner answered the Amended Compliance Specification on February 10, 2000, and amended that answer on March 21, 2000. On May 19, 2000, the Regional Office moved to strike portions of Petitioner's amended answer, and moved for partial summary judgment on several issues. A hearing was scheduled for June 28, 2000. Immediately thereafter, on May 23, 2000, the Board, *sua sponte*, issued an order transferring the matter from the Regional Office to the Board in Washington, DC, and indefinitely postponing the June 28 hearing. That order required Petitioner to respond to the motion to strike and for partial summary judgment by June 6, 2000, which Petitioner did.

There the matter sat for more than two years, until, on August 1, 2002, the Board issued a Supplemental Decision and Order. 337 N.L.R.B. 1116. (App. 162a.) In that order, the Board in part granted the motion for partial summary judgment on certain issues dealing with employee job classifications and the formula for calculating back pay. The Board also granted the motion to strike Petitioner's affirmative defenses. Specifically, the Board struck Petitioner's laches defense that the two and a half year delay between the original Compliance Specification in June 1997 and the Amended Compliance Specification in January 2000 constituted laches.

The Board also struck Petitioner's affirmative defense that the Amended Specification failed to account for payments Petitioner made to an alternative health plan in lieu of contributions to the Union's Health & Welfare Fund. The Board held as a matter of law that this affirmative defense lacked merit, citing its decision in *Grondorf, Field, Black & Co.*, 318 NLRB 996, 997 (1995), *enf. denied in pertinent part*, 107 F.3d 882 (D.C. Cir. 1997), and the Ninth Circuit's decision in *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983). (App. 162a.) The Board reasoned that employees have "a clear economic stake in the viability of funds to which part of their compensation is remitted," and that the company is not prejudiced by having to pay for health benefits twice. *Id.* One member of the Board went further, concluding that, even if the District of Columbia Circuit Court of Appeals had been correct in denying enforcement of the Board's order in *Grondorf*, the company had failed to proffer evidence showing that the Union plan provided no coverage to the employees during the violation period and that the ordered payments would be a windfall for the Union Fund. *Id.* n. 6. The third member of the Board concluded that Petitioner should be permitted to present evidence to support its contentions at the compliance hearing. *Id.*

After the Board's decision on the motion for partial summary judgment and to strike, the Board set a compliance hearing. On October 29, 2002, the Board rescheduled that hearing to March 4, 2003. On February 4, 2003, the Board again rescheduled the hearing to March 5, 2003. On February 12, 2003, the Regional Office filed a motion in limine seeking to preclude Petitioner from litigating certain issues at the compliance hearing. Petitioner responded to this

motion on February 20, 2003, and on February 28, 2003, the Administrative Law Judge granted the motion.

During the compliance hearing held on March 5, 2003, the parties engaged in a series of negotiations, promoted and assisted by the Administrative Law Judge. After extensive negotiations, the parties agreed to the terms of a settlement agreement that would have resolved all outstanding disputes. (App. 116a.) Petitioner, therefore, was under the impression from that point forward that the matter had been resolved.

Petitioner heard nothing further for more than a year, until on or about July 20, 2004. On that date, the Regional Office's compliance officer sent a letter to Petitioner's counsel, in which she informed him that the Board had rejected the terms of the agreed settlement. (App. 129a.) No reason for this rejection was provided. The compliance officer stated that the parties would have to restructure the terms of the settlement agreement "to more closely follow the Supplemental Board Order, as enforced by the Court of Appeals, and casehandling [sic] requirements." (App. 129a.)

On December 22, 2004, the Board issued a Second Amended Compliance Specification, and on January 19, 2005, the Board issued a Third Amended Compliance Specification. This specification covered the period from October 25, 1993 through January 21, 2003,[1] and provided for payments in the following approximate amounts, plus interest:

Back Pay: $141,945

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[1] On that date, the Union disclaimed any further interest in representing the employees.

Health & Welfare Fund: $165,000
Pension Fund: $79,100
Annuity Fund: $80,500
Apprenticeship Fund: $4,100

Petitioner responded to the Third Amended Compliance Specification on February 3, 2005. On April 12, 2005, the Regional Office filed a new motion in limine, to which Petitioner responded on April 18, 2005. The ALJ issued an order granting this motion in limine on April 27, 2005.

A compliance hearing was held on May 2, 2005, and the ALJ issued a Supplemental Decision on June 29, 2005. 2005 NLRB LEXIS 297. (App. 40a.) Petitioner filed exceptions to that Supplemental Decision on July 22, 2005. One year later, on August 29, 2006, the Board issued a Supplemental Decision and Order adopting the ALJ's June 29, 2005 decision. 347 N.L.R.B. No. 102. (App. 19a.) The Board ordered Petitioner to pay the following amounts, plus interest:

Back Pay: $144,000

Health & Welfare Fund: $182,000

Pension Fund $88,000

Annuity Fund $86,000

Apprenticeship Fund $4,400

The Board petitioned the First Circuit Court of Appeals for enforcement of its August 29, 2006 decision. On August 17, 2007, the First Circuit issued its order enforcing the Board's decision in full. *NLRB v. Harding Glass Co., Inc.*, 500 F.3d 1 (1st Cir. 2007). (App. 1a.) The First Circuit Court of Appeals had jurisdiction to enforce the Board's decision

pursuant to Section 10(e) of the National Labor Relations Act, 9 U.S.C. §§ 151, 160(e)).

Petitioner now seeks review of the First Circuit's August 17, 2007 order enforcing the Board's decision dated August 29, 2006.

The total underlying debt for back pay and the payments to the Union Funds is approximately $504,000. As of November 9, 2007, the interest that has accrued on that underlying debt totals approximately $240,000. (App. 133a.) In other words, as a result of the Board's delays, Petitioner's financial liability for interest alone is nearly 50% of the underlying debt. That underlying debt itself is nearly 700% higher than it was when the Board issued its first compliance specification in July 1997.

REASONS TO GRANT THE PETITION

This Court should grant the Petition because the Board's actions, revoking without explanation a settlement to which the parties had agreed with the assistance of the Administrative Law Judge, and repeatedly postponing hearings and delaying the resolution of this case, render "punitive" and "confiscatory" the Board's order that the Petitioner pay interest on the back pay and on the retroactive payments to the Union Funds.

The Court should also grant the Petition because the First Circuit improperly held that Petitioner could not apply payments it made to provide health insurance for its workers as offsets to the Board's order that it repay the Union Health & Welfare Fund for the money that it had withheld. The First Circuit held that Petitioner had failed to present any evidence to support its position in its answer to the

compliance specification, and therefore Petitioner had failed to satisfy its burden. The First Circuit's position conflicts with that of the Second and District of Columbia Circuits, which hold that an employer must be given the opportunity to present evidence of its alternate payments and to demonstrate that remedial payments to the Union Funds would be a windfall. Moreover, to the extent that the First, Second, and District of Columbia Circuits agree that offset is appropriate if the evidence is properly presented, those courts disagree with the position taken by the Ninth Circuit, which precludes offset under any circumstances. The Court therefore should grant this petition to resolve the Circuit divisions and to establish a uniform rule on this important issue.

I. The First Circuit, Misapplying This Court's Precedents, Improperly Upheld Punitive and Confiscatory Interest Payments That Serve No Legitimate Purpose Under The National Labor Relations Act.

The Board ordered Petitioner to make three types of payments: (i) back pay to employees; (ii) back payments to the Union Funds; and (iii) interest on the first two items. Petitioner does not now challenge the back pay order and, except as discussed below, does not challenge the order to repay the Union Funds.

The First Circuit upheld the Board's order that Petitioner pay interest on the back pay and on the payments to the Union Funds based on its conclusion that this Court's precedents in *National Labor Relations Board v. J.H. Rutter-Rex Manufacturing*

Co., 396 U.S. 258 (1969), and *National Labor Relations Board v. International Association of Bridge, Structural & Ornamental Ironworkers*, 466 U.S. 720 (1984), precluded it from modifying the Board's decision. (App. 17a.) The First Circuit misconstrued those cases.

In *J.H. Rutter-Rex*, the Fifth Circuit Court of Appeals held that, as a result of the Board's inordinate nine-year delay in resolving the case, the Board's back pay award for that period did not serve the intended "deterrent" purpose. The court therefore reduced the applicable back pay period to limit the total amount of back pay that the company would have to pay. 396 U.S. at 264. This Court reversed, holding that, despite its "deplorable" delays, the Board reasonably determined that the employer, rather than the employees, should bear the burden of the delays, and the courts had no authority to decide otherwise. *Id.* at 264-66. This Court held that back pay was not a deterrent, but a remedy designed to vindicate the public policy of the National Labor Relations Act by making employees whole for losses suffered as a result of unfair labor practices. *Id.* at 263. This Court expressly limited its holding in *J.H. Rutter-Rex* to the specific facts presented. *Id.* at 259.

In *Ironworkers*, this Court again addressed the effect of egregious Board delays on the court's authority to modify a Board back pay order. There, the Union had discriminated against nonmembers and the Board ordered the Union to compensate the nonmembers for lost earnings. Several years later, the Board finally issued the back pay specification. The Union appealed, arguing, *inter alia*, that the back pay specification was "punitive" and "confiscatory" because it exceeded the Union's ability to

pay. The Court of Appeals modified the Board's order to limit the number of individuals entitled to back pay, thereby reducing the total amount of the award. 466 U.S. at 724.

On review, this Court reiterated the principal of *J.H. Rutter-Rex* that the Board's delay alone could not support modification of a back pay award. 466 U.S. at 724-25. However, the record was unclear as to whether the Court of Appeals had based its decision solely on the Board's delay or whether it had also agreed with the Union's argument that the Board's order was "punitive" or "confiscatory." Although this Court reversed the Court of Appeals' reduction of the back pay award, it specifically declined to address whether the court might modify its original judgment enforcing the Board's order if that order were shown to be "punitive" or "confiscatory." *Id.* at 726.

Properly understood, *J.H. Rutter-Rex* and *Ironworkers* stand for the proposition that even egregious delay by the Board, by itself, is insufficient to permit a court to modify a back pay award, but that egregious delay coupled with other factors may justify such a modification where the combination renders the award "punitive" and "confiscatory" or otherwise inconsistent with the purposes of the National Labor Relations Act. The First Circuit therefore misapplied *J.H. Rutter-Rex* and *Ironworkers*.

This Court has never decided under what circumstances a Board order becomes "punitive" or "confiscatory" rather than serving a legitimate remedial purpose under the Act. Petitioner respectfully suggests that this is such a case. Unlike *J.H. Rutter-Rex* and *Ironworkers*, Petitioner does not seek a

reduction in the amount or scope of the Board's back pay order. Petitioner seeks only a recognition that it is inconsistent with the remedial purposes of the Act not to toll the accrual of interest on the back pay order and on the retroactive payments to the Union Funds where the Board repeatedly postponed hearings and otherwise delayed the case and where the Board voided a good faith settlement agreement that the parties had agreed to with the assistance of the ALJ.

Unlike the typical case where the back pay remedies the employer's unfair labor practices, here, the Board has imposed a remedy for a problem that the *Board* created. This case falls squarely within the scope of the Court's admonition in *Ironworkers* that delay coupled with other factors could render an otherwise acceptable Board order punitive and confiscatory. The Board's order that Petitioner pay the interest that accrued as a result of the Board's actions does not remedy any actual consequences *of the unfair labor practices*, *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984), but instead remedies the consequences of the Board's decision to void the parties' settlement agreement and to prolong the proceedings for years.

II. The Circuits Are Split with Respect to Whether An Employer May Offset Its Payments For Alternative Benefits Against Repayment To The Union Funds.

A. The First Circuit's Holding That An Employer Must Prove In Its Answer To A Compliance Specification That Payments To Union Funds Would Provide A Windfall Conflicts With The Position Of The Second And District Of Columbia Circuits.

Beginning in October 1993, Petitioner stopped paying into four Union Funds: the Health & Welfare Fund, the Pension Fund, the Annuity Fund, and the Apprenticeship Fund. In lieu of making payments to the Health & Welfare Fund, Petitioner paid for health insurance for its employees that otherwise would have been provided by that Fund.[2]

In the Board proceedings, Petitioner raised as an affirmative defense that it should be permitted to apply the payments it made to provide health insurance to its employees as an offset against any Board order requiring it to pay amounts that it had not paid into the Health & Welfare Fund. In the Board's Supplemental Decision and Order dated August 1, 2002, the Board granted the Regional Office's motion to strike this affirmative defense without giving Petitioner an opportunity to present any evidence or arguments in support of it. Citing a Board decision that the District of Columbia Circuit

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[2] Petitioner did not provide alternate pension, annuity, or apprenticeship benefits, and does not challenge the Board's order that it retroactively make the appropriate payments to those three funds.

had refused to enforce, the Board held as a matter of law that the affirmative defense lacked merit:

> it is well established that "[e]mployers have, in addition to a stake in receiving benefits negotiated on their behalf by their chosen representatives, a clear economic stake in the viability of funds to which part of their compensation is remitted." *Grondorf, Field, Black & Co.*, 318 NLRB 996, 997 (1995), *enf. denied in pertinent part*, 107 F.3d 882 (D.C. Cir. 1997). Moreover, the wrongdoing employer should not benefit by having at its disposal money which rightfully belonged to the contractual funds. Nor is the wrongdoing employer disadvantaged by receiving no offset for benefits provided through an employer sponsored alternative plan. Thus "[A]n employer cannot complain of the extra cost of improperly created, substitute fringe benefits . . . The company is merely required to repay what it has unlawfully withheld . . . [I]t was the company that unlawfully chose to incur the additional expense of a private insurance program." *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983).

Harding Glass Co., Inc., 337 NLRB No. 175 (Aug. 1, 2002) at 3 (App. 110a-111a) (ellipses in original). In a footnote, Chairman Hurtgen acknowledged that, if the union health fund had provided no coverage to the employees while the company's plan was in effect, then "a Board-ordered payment to the plan fund for that period would be, to that extent, a windfall to the fund." *Id.* n.6. However, the Chairman asserted that, because Petitioner had not proffered any evidence on this point in its answer to the compliance specification, there was no basis for concluding that there was an improper windfall. *Id.* Member Bart-

lett dissented from this portion of the Board's decision:

> Contrary to his colleagues, Member Bartlett would permit the Respondent to present evidence at the compliance hearing, consistent with the D.C. Circuit's decision in *Grondorf, Field, Black & Co. v. NLRB*, *supra*, . . . that its contributions to the contractual benefit funds should be reduced to avoid an improper windfall for those funds. Although the Board has not adopted the D.C. Circuit's view in *Grondorf*, allowing the Respondent to introduce such evidence into the record now would avoid a remand by the D.C. Circuit [sic] later, in the event the Respondent seeks a court review of the Board's final decision. Further, a full factual record might assist the Board in evaluating whether to adopt the D.C. Circuit's view.

Id.

On appeal, Petitioner reiterated its argument that it should have been permitted to provide evidence to support its affirmative defense. The First Circuit held that Petitioner was required to provide detailed evidence to support its affirmative defense in its answer to the compliance specification pursuant to 29 C.F.R. § 102.56(b). (App. 13a.) The court held that, although Petitioner asserted in its answer that it had provided health and medical insurance to its employees at no cost to them, it "did not explain how payment to the union funds would fail to benefit employees or would result in a windfall, nor did it assert the specific amount it was seeking as an offset." *Id.*

The First Circuit's holding on this issue conflicts with that of the District of Columbia Circuit. In

Grondorf, Field, Black & Co. v. NLRB, 107 F.3d 882 (D.C. Cir. 1997), the employer ceased paying into the union health and welfare fund, but provided separate health insurance for its employees. The employer argued that it should not have to repay the union fund. The Board rejected that view and ordered the employer to make the union fund whole for all payments that it had not made. 318 NLRB 996, 997 (1996). On appeal, the District of Columbia Circuit rejected the Board's position and held that the employer should be permitted on remand to demonstrate that its alternate payments must be offset in order to avoid an improper windfall to the union funds. 107 F.3d at 888.

The First Circuit's position also conflicts with that of the Second Circuit. In *NLRB v. Coca-Cola Bottling Co. of Buffalo*, 191 F.3d 316 (2d Cir. 1999), the court held that a company may be ordered to repay union funds to the extent that the employees have a future interest in the funds. The court emphasized, however, that the Board must have "concrete evidence" that the employees have an ongoing economic stake in the future of the fund. *Id.* at 324. Where the employees do have such a future interest, the repayments are remedial because they ensure the funds' future viability to satisfy employee needs. *Id.* But in the absence of a future interest, repayments constitute a windfall to the funds and will not be enforced. *Id. Accord Manhattan Eye Ear & Throat Hosp. v. NLRB*, 942 F.2d 151 (2d Cir. 1991). Here, the employees have no future interest in the Health & Welfare Fund, and the Union ceased its representation in 2003.

This Court should grant the petition to resolve this dispute between the Circuits and to ensure that

repayments to union funds do not provide a windfall to the funds.

B. There Is A Division Between The First, Second, and District of Columbia Circuits On One Side, And the Ninth Circuit On The Other, As To Whether An Employer May Offset Its Payments For Alternative Benefits Against Repayment To The Union Funds.

As discussed above, the First Circuit's position conflicts with that of the Second and District of Columbia Circuits as to whether an employer must provide evidence to support its offset argument in its answer to the specification or whether the employer may prove its case during the compliance hearing. However, the Second and District of Columbia Circuits agree that an employer may offset its alternative payments, and the First Circuit, while not explicitly reaching the issue, appears to agree, if the employer meets the appropriate evidentiary prerequisites.

On this point, the Ninth Circuit takes a contrary view. The Ninth Circuit categorically bars an employer from offsetting its payments to alternative plans against an order that it repay the union funds. In *Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), the court refused to permit offset:

> Stone's first contention, that the order is punitive rather than remedial, conflicts with existing Ninth Circuit precedent. In *NLRB v. Carilli*, 648 F.2d 1206 (9th Cir. 1981), we held that an employer cannot complain of the extra cost of improperly created, substitute fringe benefits. *Id.* at 1217. The company is merely required to

> repay what it has unlawfully withheld. As in *Carilli*, it was the company that unlawfully chose to incur the additional expense of a private insurance program. Even if Stone's substitute fringe benefit program met the present needs of its employees, the diversion of contributions from the union funds undercut the ability of those funds to provide for future needs.

715 F.2d at 446.

This Court should grant the petition for a writ of *certiorari* to resolve this split between the Circuits, and to provide a uniform rule.

III. The First Circuit's Decision, Which Upheld The Board's Order Requiring Petitioner to Pay to the Health & Welfare Fund Amounts That Petitioner Withheld While Paying for an Alternative Employee Health Plan, Conflicts With This Court's Holding In *Sure-Tan*.

The First Circuit held that Petitioner must repay the union Health & Welfare Fund because it failed to comply with a technical requirement in the Code of Federal Regulations concerning the specificity of the employer's answer to a compliance specification. This holding also conflicts with this Court's holding in *Sure Tan*, 467 U.S. at 901. This Court has emphasized that the Board is permitted to order back payments only to the extent that they remedy *actual*, and not speculative losses. Under this standard, the First Circuit's affirmance of the Board's repayment order cannot stand. There is simply no evidence in the record to support the conclusion that the order to repay the Health & Welfare Fund is anything other than a windfall and there is no evidence to support the conclusion that there was any "actual" loss to

remedy. The Board's repayment order is, with respect to the Health & Welfare fund, purely speculative.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Petition for a Writ of *Certiorari*.

Respectfully submitted,

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November 15, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 06-2540

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HARDING GLASS COMPANY, INC.,
Respondent.

JUDGMENT

Entered: August 17, 2007

This cause came on to be heard on a petition for review of an order of the National Labor Relations Board and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The National Labor Relations Board's petition for enforcement is granted.

By the Court:

/s/ Richard Cushing Donovan
RICHARD CUSHING DONOVAN, Clerk

[cc: Mr. Weihrauch, Ms. Powers, Ms. Pye, Mr. Young, Mr. Jacob, Mr. Higgins, Mr. Ferguson, Mr. Dreeben, & Mr. Feinberg.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 06-2540

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HARDING GLASS COMPANY, INC.,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before

Lynch, *Circuit Judge*,
Selya, Senior *Circuit Judge*,
and Lipez, *Circuit Judge*.

Christopher W. Young, Attorney, National Labor Relations Board, with whom *Fred B. Jacob*, Supervisory Attorney, *Ronald Meisburg*, General Counsel, *John E. Higgins. Jr.*, Deputy General Counsel, *John H. Ferguson*, Associate General Counsel, and *Aileen A. Armstrong*, Deputy Associate General Counsel, were on brief, for petitioner.

Robert Weihrauch for respondent.

August 17, 2007

LYNCH, *Circuit Judge*. The slow grinding of the wheels of justice is a major theme in this National Labor Relations Board ("NLRB") compliance case.

In 2006, the NLRB awarded remedies for unfair labor practices committed by Harding Glass Company ("*Harding*") in 1993. *Harding Glass Co. (Harding III)*, 347 N.L.R.B. No. 102, at 2 (Aug. 29, 2006). Those remedies awarded over $144,000 in back pay to nine employees and over $360,000 to four union funds, with accrued interest. Id. The Board seeks enforcement; the company says that enforcement should be denied, arguing that it would be driven out of business by enforcement of the order and that the sums owed should, at the least, be discounted for the delay in the resolution of this matter.

The case has cautionary lessons for counsel about the costs of minimalist responses to Board allegations. Here, the company failed to comply with the Board's rules for answering compliance specifications. Those rules require highly specific information, going well beyond the requirements for answers in civil actions in federal courts. Additionally, although interesting legal issues may lurk as to the limits of the Board's ability to order payment to union funds, the company has failed to provide any facts, thus rendering the questions hypothetical.

We reject the company's arguments and enforce the Board's order. We note that the Board has offered to work with the company on a payment plan, should that be necessary.

I.

This saga, unfortunately, has taken fourteen years. Harding sells and installs glass for automobiles and commercial buildings in Worcester, Massachusetts.

In October 1993, the company employed two glaziers and three glassworkers. The glaziers repaired and installed industrial and commercial glass, while the glassworkers repaired and replaced automobile glass. Glaziers Local 1044, International Brotherhood of Painters & Allied Trades, AFL-CIO ("the Union"), represented both sets of employees.

Several months before the expiration of the then-current collective bargaining agreement on October 16, 1993, the parties, at Harding's request, entered into negotiations for a successor agreement. The company proposed to reduce the glaziers' pay rate from $22.05 per hour to $13.73 per hour, while raising the glassworkers' pay rate from $13.23 per hour to $13.73 per hour. The company also proposed eliminating all contributions to the Union's health, welfare, pension, and annuity funds; it proposed replacing only the health fund with another insurance plan. The Union put forward a counterproposal, which Harding rejected. On October 17, the glaziers voted to reject Harding's offer and strike. They established a picket line the next day. The glassworkers initially respected the glaziers' picket line.

The parties met again on October 22 but failed to reach an agreement. On October 23, Harding implemented its final offer. The company offered the glassworkers the wage and benefit package it had initially offered the Union, while at the same time threatening to replace them. The three glassworkers resigned from the Union and resumed working for Harding. The two glaziers maintained their picket line, and the company hired a new glazier under its new terms and conditions of employment. The Union filed unfair labor practice charges against Harding alleging that the company had, inter alia, uni-

laterally implemented its final offer in the absence of a bona fide impasse in collective bargaining.

The Board, on March 31, 1995, held that the company had, by its actions, violated section 8(a)(5) of the National Labor Relations Act ("NLRA") by implementing unilateral changes in employment conditions without a valid impasse in bargaining. *Harding Glass Co. (Harding I)*, 316 N.L.R.B. 985, 985 (1995). This court, on March 27, 1996, enforced that portion of the Board's order.[1] *NLRB* v. *Harding Glass Co.*, 80 F.3d 7, 10 (1st Cir. 1996). Under the relevant provisions of the Board's order, the company was directed to restore all terms and conditions of employment to the status quo as of October 23, 1993 and to make whole all employees and union funds for the losses they had suffered. *Harding I*, 316 N.L.R.B. at 986. It is this make-whole obligation for the 1993 events that is the subject matter of the proceedings before us.

Once it had the enforcement order, the agency did not act promptly. The Regional Office did not issue a Compliance Specification until July 1, 1997. Thereafter, it issued a First Amended Compliance Specification on January 20, 2000. After various proceedings, the Board issued an order on August 1, 2002, granting in large part the General Counsel's motion to strike portions of Harding's answer for failure to comply with the Board's rules. Those rules

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[1] The court denied enforcement of another portion of the order, disagreeing with the Board that the economic strike, begun on October 18, 1993, had been converted to an unfair labor practice strike on October 25, 1993, the date union representatives informed the striking glaziers of Harding's implementation of unilateral changes. *NLRB* v. *Harding Glass Co.*, 80 F.3d 7, 11, 13 (1st Cir. 1996).

require respondents who dispute compliance allegations to provide supporting figures or information. The Board, having struck most of Harding's answer, then granted, with one exception, summary judgment against the company on the pay rates and the method of back pay calculation alleged by the General Counsel to apply to the affected employees. *Harding Glass Co.* (*Harding II*), 337 N.L.R.B. No. 175, at 2-4 (Aug. 1, 2002). The Board denied the motion for summary judgment as to employee James Tritone and left open for litigation the issue of whether Tritone's back pay should be based on the full contract rate for a glazier, $22.05 per hour, at the time of Tritone's reinstatement after recovering from a work-related injury. *Id.* at 2-3. For the period in question, from March 28 to April 15, 1994, Harding had paid Tritone at the rate of $13.73 per hour. The Board also left open for litigation the parties' dispute over the date on which the economic strike ended. *Id.* at 3-4.

In its 2002 order, the Board rejected the company's affirmative defense that the amended compliance specification should be dismissed in its entirety because of delay by the Regional Office. The Board was not moved by the two-and-a-half-year gap between the issuance of the initial Compliance Specification and the First Amended Compliance Specification. The Board similarly rejected Harding's defense that it was entitled to offset on the payments due to the union funds for the value of alternative benefit payments made by the company. The Board ordered that both affirmative defenses be stricken. *Id.* Thus, the 2002 Board order resolved most, but not all, of the remedial issues and remanded the remaining matters to an administrative law judge ("ALJ") for hearing. *Id.*

The company, instead of trying to expedite the remaining proceedings, took the opposite tack. It did not ask the Board to enter final judgment in 2002 on the matters then resolved. Rather, Harding chose to petition for review of the Board's interlocutory order. The predictable result was that this court granted, on November 25, 2002, the Board's motion to dismiss on the ground that we lacked jurisdiction because there was no final order.

Again there was delay by the Regional Office as to the issues remanded to the ALJ. The Regional Office, over two years later, issued a Second Amended Compliance Specification on December 22, 2004. That was updated by a Third Amended Compliance Specification on January 19, 2005.

On April 12, 2005, the General Counsel filed a motion in limine to preclude Harding from rearguing issues that had already been resolved against the company in the underlying unfair labor practice proceedings. On April 27, 2005, the ALJ granted the motion, over the company's objection.

On June 29, 2005, the ALJ issued a supplemental decision agreeing with the Regional Director's back pay calculations for the individual employees as well as for monies due to the union funds. The ALJ agreed with the Regional Director that the economic strike ended on June 4, 1996, and that the back pay period for replacement workers began on the following day, June 5, 1996. As to the issue of back pay for Tritone, the ALJ found that he was entitled to the full contract rate for glaziers, and awarded back pay to Tritone in the amount of $975.89 plus interest. In total, the ALJ ordered Harding to pay lost wages of

$144,074.95 plus interest to nine employees[2] and $360,067.37 plus interest to four union funds.[3] The company sought review by the Board.

On August 29, 2006, the Board rejected the company's exceptions, adopted the ALJ's rulings, and directed Harding to pay the specified amounts plus interest to the employees and the union funds. *Harding III*, 347 N.L.R.B. No. 102, at 1-2. With respect to the calculation of Tritone's back pay, the Board agreed with the ALJ that Tritone was entitled to the contractual glazier rate of $22.05 per hour for the period from March 28 to April 15, 1994. *Id.* at 2.

On October 25, 2006, the Board petitioned for enforcement of its order in full. Harding did not cross-petition for review, but it did assert in its answer to the enforcement application that the Board's decision and order "are without foundation in law or fact and are erroneous as a matter of law" and "are not supported by substantial evidence on the record as a whole."

II.

A. *The Board's 1995 Order*

On several occasions, Harding has attempted to relitigate issues already decided against it in the Board's March 31, 1995 order. The Board and the ALJ justifiably rejected these efforts. *See Transport Serv. Co.*, 314 N.L.R.B. 458, 459 (1994) ("Issues litigated and decided in an unfair labor practice

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[2] The employees are Robert Mosely, James Tritone, Richard Poirer, James Gabrielle, Richard VonMerta, David Elworthy, Christopher Carle, Christopher Pelletier, and Kenneth Bullock.

[3] The funds are the Health and Welfare Fund, the Pension Fund, the Annuity Fund, and the Apprenticeship Fund.

proceeding may not be relitigated in the ensuing backpay proceeding.").

To the extent Harding argues before this court that it did not unilaterally implement its last and final offer in the absence of a valid impasse in bargaining, that argument is foreclosed. The Board's 1995 order concluded that Harding implemented unilateral changes without having reached a bona fide impasse. *Harding I*, 316 N.L.R.B. at 985. A different panel of this court affirmed that conclusion. *Harding Glass Co.*, 80 F.3d at 10, 13. We will not reconsider the issue here. The company is not free to relitigate in an enforcement proceeding the underlying finding of liability already decided by this court.

B. *The Board's 2002 Entry of Summary Judgment and Striking of Affirmative Defenses*

Harding argues that the Board erred (1) in sua sponte granting summary judgment for the Regional Director on certain claims (e.g., dates pertaining to employees' back pay periods and the status of eight employees as strike replacement workers) which would otherwise have been litigated; (2) in allowing the Director's request for summary judgment that two employees, David Elworthy and Christopher Pelletier, were entitled to the glassworkers' pay rate; and (3) in striking the company's affirmative defense of mitigation of liability to the union funds.[4]

What all three claims have in common is Harding's failure to understand or meet its responsibilities in

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[4] Harding also argues that it should have been permitted to introduce evidence regarding its affirmative defense that the delay in initiating the compliance proceedings resulted in an impermissible punitive and confiscatory order, and thus the judgment should be modified. We discuss this claim below.

answering compliance specifications issued by the Regional Director. The applicable rules, contained in the Code of Federal Regulations, provide:

> The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. . . . As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, *a general denial shall not suffice.* As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

29 C.F.R. § 102.56(b) (emphasis added).

Harding responded to the Regional Director's compliance specification with general denials and inadequate explanations. It did not, for example, in its answers and amended answers dispute the running of the back pay period by providing alternate dates and a rationale. Nor did it sufficiently explain the basis for its claim that eight employees were strike replacement workers not entitled to the earnings and benefits of the 1991-1993 collective bargaining agreement. As for the Regional Director's allegation that Elworthy and Pelletier were glassworkers, it was not enough for Harding simply to deny that this was so. As the Board noted, Harding

did not explain what jobs these employees performed, if they were not glassworkers. Nor did the company state the basis for its disagreement with the job classification alleged in the compliance specification.

Under the Board's rules, when a respondent fails to deny allegations with the required specificity, those allegations are "deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation[s], and the respondent shall be precluded from introducing any evidence controverting the allegation[s]." *Id.* § 102.56(c). Harding had fair notice of the costs of its evasiveness. The Board was justified in striking portions of Harding's answer and awarding partial summary judgment based on the allegations that were deemed admitted to be true.

Harding nonetheless complains of the sua sponte nature of the Board's award of summary judgment on issues that the Regional Director was prepared to litigate. Harding never raised a word of protest about the sua sponte nature of the ruling to the Board, though it could have sought reconsideration on this basis. We will not hear such a procedural objection for the first time. *See* 29 U.S.C. 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *see, also Woelke & Romero Framing. Inc.* v. *NLRB*, 456 U.S. 645, 665 (1982); *E.C. Waste. Inc.* v. *NLRB*, 359 F.3d 36, 41 (1st Cir. 2004).

Somewhat different is Harding's argument that the Board erred in requiring it to make contributions of over $360,000 to four union funds. The company asserts broadly that it offered health insurance

coverage to the employees during this period and so it would be a windfall to the funds to pay back to them the full amount of the contributions Harding withheld. Harding asserts that it should be able to offset the contributions it made for the health plan it unilaterally established for employees against the ordered payments to union funds.

This court has not addressed this issue, on which the circuit courts appear to have differing views. One court of appeals apparently has taken the view that the company is not entitled to an offset because it was the company's unlawful choice to set up a private substitute insurance program. *See Stone Boat Yard* v. *NLRB*, 715 F.2d 441, 446 (9th Cir. 1983). Under such an approach, Harding's contributions to a separate insurance program are immaterial, and its evidence is irrelevant.

In *NLRB* v. *Coca-Cola Bottling Co. of Buffalo*, 191 F.3d 316 (2d Cir. 1999), the court held that make-whole remedial relief may include contributions to union funds insofar as the employees have a future interest in the financial strength of the funds. Id. at 324. Under the *Coca-Cola Bottling* rationale, the limitation on the Board's ability to order fund contributions derives from the "essentially remedial" policies of the NLRA. *Id.*; *cf. Sure-Tan. Inc.* v. *NLRB*, 467 U.S. 883, 900 (1984) ("[A] backpay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices."). This approach is supported by the Board's view that contributions to union funds may be ordered, at least where employees have an interest in the future viability of those funds. *See 1849 Sedgwick Realty LLC*, 337 N.L.R.B. 245, 248 n.8 (2001) (stating that the Board has never "held that

fund contributions may be ordered in the absence of [a future] interest"); *Manhattan Eye Ear & Throat Hosp.*, 300 N.L.R.B. 201, 201-02 (1990) (adopting order of ALJ that company make fund contributions on rationale that employees had "a clear economic stake in the viability of funds to which part of their compensation [was] remitted"), *enforcement denied*, 942 F.2d 151 (2d Cir. 1991).

In some instances, courts have directed the Board, in circumstances where the employer provided alternative benefits, to permit an employer an opportunity to show that payments to union funds would be punitive, and not remedial. These courts have remanded to permit the company to show that such reimbursement would fail to benefit employees or would result in windfalls to union funds. *See Grondorf, Field, Black & Co.* v. *NLRB*, 107 F.3d 882, 888 (D.C. Cir. 1997); *Manhattan Eye Ear & Throat Hosp.* v. *NLRB*, 942 F.2d 151, 159-60 (2d Cir. 1991).

We take no position on the issue because Harding failed to provide sufficient facts in support of its argument. At most, the company asserted that the employees in question were provided with health and medical insurance at no cost to them. Harding did not put forward any other relevant facts. The company did not explain how payment to the union funds would fail to benefit employees or would result in a windfall, nor did it assert the specific amount it was seeking as an offset. To the extent (if at all) the argument is viable, it is the employer who bears the burden of putting necessary facts into the record. *See Banknote Corp. of Am.*, 327 N.L.R.B. 625, 625 (1999); *see also* 29 C.F.R. § 102.56(b)-(c). In the absence of such facts, the company's claim necessarily fails.

C. *The Board's 2006 Back Pay Award*

The Board has broad remedial powers under section 10(c) of the NLRA, 29 U.S.C. § 160(c). *Sure-Tan*, 467 U.S. at 898-99. The Board has discretion both to determine that back pay is appropriate to restore the economic status quo and to compute the back pay amount. *See Va. Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 540-41 (1943); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 198 (1941).

The only real issue here is the amount of the back pay award. Harding does not dispute the method of calculation. Rather, it argues that the back pay period should be shorter. It attacks the date of June 5, 1996 as the starting point for calculating back pay for replacement employees. The usual rule applies that the Board's findings must stand unless there is no substantial evidence supporting them. *See Hosp. Cristo Redentor. Inc.* v. *NLRB*, 488 F.3d 513, 518-19 (1st Cir. 2007). The Board's choice of date is more than adequately supported by the evidence.

The ALJ picked June 5, 1996 on the basis of his determination that the economic strike ended on June 4, 1996. This finding was based on a letter dated June 4, 1996 that Harding received from the Union, which stated that the strike against the company had concluded by January 1, 1994. The reasons given were that (1) all striking employees—that is, the glaziers—who were able to work had found other jobs and were not seeking reinstatement with Harding, and (2) the Union had stopped picketing by that January date.

Despite the fact that the Union's position covered all employees, Harding argued to the Board that the strike was ongoing because it had not received

explicit notice of whether one of the striking employees, Charles Jones, had unequivocally abandoned his right to future employment with the company or had made an unconditional offer to return to work for Harding. The Board reasonably rejected the company's argument that the strike continued beyond June 4, 1996.[5] As the company knew from the Union's letter, Jones fit in the category of those who had found other employment. Harding's position is based on a fundamental misapprehension of labor law. It is the union that speaks for its striking employees, and silence from a particular employee can hardly justify the company's position. *See Metro. Edison Co.* v. *NLRB*, 460 U.S. 693, 705 (1983) (recognizing that a union may waive a represented employee's right to strike); *Plumbers & Pipefitters Local Union No. 520* v. *NLRB*, 955 F.2d 744, 751 (D.C. Cir. 1992) ("Among the rights that may be modified or waived [by the union] is the right to strike."). The case on which Harding relies, *Service Elec. Co.*, 281 N.L.R.B. 633, 636-37 (1986), has very different facts and is self-evidently inapplicable.

That leaves the company's objection to the back pay award to Tritone for the period from March 28 to April 15, 1994. The Board rejected Harding's argument that Tritone, who performed glazier work when the strike started, was not entitled to back pay at the full contract glazier's rate because he could not upon reinstatement perform the same work that he did prior to the strike. *Harding III*, 347 N.L.R.B. No. 102, at 1-2.

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[5] The ALJ used the date of the Union's June 4, 1996 letter as the ending date for the strike, even though the letter's contents indicated that the strike had ended by January 1, 1994. The ALJ's use of the June 4, 1996 date therefore favored Harding.

The Board applied its usual rule that an employee is entitled to reinstatement to the position he was in at the time of the strike unless the company shows changed circumstances. *See Transport Serv. Co.*, 314 N.L.R.B. at 459; *cf. NLRB* v. *Rockwood & Co.*, 834 F.2d 837, 841 (9th Cir. 1987) (holding that economic striker was "entitled to reinstatement to his former position, to one substantially equivalent, or to one for which he was qualified"). The Board found that the work Tritone performed upon reinstatement was glazier's work, notwithstanding the fact that the work was not the same as before. *Harding III*, 347 N.L.R.B. No. 102, at 1. The evidence shows that Tritone returned to work in a "temporary modified duty position," as described in a company letter dated March 21, 1994. Tritone also testified before the ALJ that he "measure[d] store fronts" for possible future glass replacement and brought cars back to the workshop during the applicable period, and that he performed these same tasks as part of his previous work as a glazier. Further, the workers' compensation insurance provided under the collective bargaining agreement supported the characterization of Tritone's post-reinstatement work as glazier's work that was entitled to the full contract rate. Harding's own Modified-Duty Policy provided "*full wages* for an injured employee during recovery" (emphasis added). Joseph Guiliano, the Union's business manager, also testified that there was never "an agreement with Harding Glass or its representatives that Harding could pay the glaziers less than the full contract rate while they were on any kind of light duty." Again, the Board's order is more than adequately supported.

D. *Delay*

Harding argues that it should not have to bear the consequences of the interest payments (at least) accruing during the long pendency of this action. Several different concerns are raised by the delay in this case.

First, those primarily hurt by the delay are those employees who did not receive the back pay or benefits to which they were entitled. *See NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264 (1969) ("Wronged employees are at least as much injured by the Board's delay in collecting their back pay as is the wrongdoing employer."). There is no basis to excuse Harding from providing the relief which has been ordered. Delay in a labor proceeding cannot be a basis on which to deny a remedy to the victims of the company's unfair labor practice. *See NLRB* v. *Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers. Local 480*, 466 U.S. 720, 724-25 (1984) (per curiam) ("It is well established . . . that the Court of Appeals may not refuse to enforce a backpay order merely because of the Board's delay subsequent to that order in formulating a backpay specification."); *J.H. Rutter-Rex*, 396 U.S. at 265 ("[T]he Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers.").

Second, Harding is itself responsible for delay, as this opinion shows, and so the company has little basis to seek refuge in equitable arguments. The company has had the use of the money the entire time. It has also had the option of establishing a reserve to fund its contingent obligation. In any event, while it is true that the dollar amounts have

risen over time, the company has the option of trying to work out a payment plan.

Third, none of this lets the NLRB off the hook for the extraordinary length of time it took to resolve a relatively simple labor issue. Not only has the delay hurt the employees, it undermines confidence in the agency. At oral argument, the court directed Board counsel to file a supplemental memorandum explaining measures the agency is taking to improve its compliance procedures to avoid lengthy delays in case processing. On June 20, 2007, the Office of the General Counsel filed a letter with us outlining four measures the agency has taken to reduce delays in compliance proceedings. We hope that such egregious delay will not recur.

We grant the Board's petition for enforcement.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD
(N.L.R.B.)

Cases 1-CA-31148 and 1-CA-31158

HARDING GLASS COMPANY, INC. and GLAZIERS LOCAL 1044, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO

August 29, 2006

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 29, 2005, Administrative Law Judge Joel P. Biblowitz issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the decision of the administrative law judge and a motion to correct inadvertent typographical error in the Decision of the administrative law judge.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

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[1] We grant the General Counsel's motion to correct inadvertent typographical error in the decision of the administrative

This is a compliance case. Among other things, the judge found, and we agree, that discriminatee James Tritone's backpay should be calculated based on a glazier's rate of $22.05 per hour for his work from March 28, 1994 to April 15, 1994. Our dissenting colleague disagrees.

The facts are undisputed. Tritone began working for the Respondent as a glazier in 1988. In April, 1993, he suffered a severe wrist injury and was out of work for approximately 8 weeks. When Tritone returned to work, he continued to perform the tasks of a glazier despite being under medical care for his injury. The Respondent's employees commenced an economic strike on October 18, 1993. The strike ended a week later. On January 31, 1994,[2] the Respondent wrote to Tritone and offered him employment to a "modified duty (light work)" position. Tritone rejected this position through his workers' compensation counsel. On March 15, the Respondent sent Tritone a second offer for a "permanent light duty full time position." Tritone accepted this offer. On March 21, the Respondent clarified this second offer as a "temporary modified duty position" available for 45 days at which time the Respondent would evaluate Tritone's ability "to perform [his] regular duties as a glazier." When Tritone returned to work on March 28, he saw a posted notice describing the Respondent's workers' compensation program. The notice indicated that "[m]odified duty is temporary (no longer than 45 days). It is a process that provides full wages for an injured employee

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law judge. The Respondent owes the Apprenticeship Fund the amount of $4,422.81, plus interest. We correct the administrative law judge's Order accordingly.

[2] All dates hereafter are in 1994.

during recovery." Tritone's last day of employment for the Respondent was April 15, the date that he voluntarily quit.

Since Tritone was performing glazier work at glazier pay at the time of the strike, he was entitled to reinstatement as a glazier and to glazier pay upon his return. Tritone worked from March 28 to April 15, but he was not paid the glazier rate.

In contending that Tritone was only entitled to a non-glazier rate of pay, our dissenting colleague notes the judge's finding that Tritone returned to work that was "substantially different from the work that he had previously performed." Our colleague states that "Tritone did not, and could not, perform the work of a glazier." In this regard, he further notes that the Respondent's March 21 clarification stated that, after 45 days in a "temporary modified duty position," the Respondent would evaluate Tritone as to his abilities "to perform [his] regular duties as a glazier."

We agree that Tritone's work during the 2-week period was not the same as that performed prior to the strike. However, the issue is whether the work during that 2-week period was glazier work. Glazier work can encompass many duties. The fact that his work, upon return from the strike, was different from the work before the strike does not mean that his work upon return was not glazier work. In our view, it was glazier work, and thus Tritone was entitled to glazier pay. In this regard, the judge found that Tritone performed the glazier work of "measuring store fronts and doors for possible future glass replacement." Tritone testified that he not only performed these duties during the applicable period but that he had also performed them in the past as part of his regular glazier duties. Tritone also

testified that, in addition to this specific glazier work, he picked up cars and brought them back to the shop to have the auto glass employees work on them. Tritone testified that he did this work during the applicable period and that he and other glaziers performed this work in the past. In these circumstances, we conclude that he performed glazier work.

Also, the Respondent had no agreement with the Union to permit it to pay less than the full contractual rate when an employee is on light duty. Joseph Guiliano, the Union's business manager, testified that the Union never had an agreement with the Respondent whereby the Respondent "could pay the glaziers less than full contract rate while they were on any kind of light duty." Given that Tritone performed glazier work (albeit in a modified duty position) during the applicable period and that the Board's order required restoration of the status quo ante, it follows that the Respondent was obligated to pay Tritone at the glazier "full contract rate" of $22.05 per hour.

Finally, we note that article XIV of the parties' contract provided that "all employers of Glaziers Local 1044 must have Workers Compensation Insurance . . . to cover all members employed by them." The Respondent's notice described its workers' compensation program with the assurance that the program "provide [d]full wages for an injured employee during recovery" while that employee was filling a "temporary modified duty position" for 45 days. The Respondent's workers' compensation program was a term and condition of employment. It set forth the Respondent's policy regarding employees on

modified duty.[3] Under that policy, Tritone was entitled to be paid at "full wages" based on the contractual glazier rate of $22.05 per hour. Our dissenting colleague's conclusion that the Respondent's "failure . . . to adhere to its workers compensation obligations . . . is an issue for another forum" is misplaced. We are not passing on the issue of how this policy of the Respondent would affect a determination made by a State workers' compensation agency. Rather, we are saying that, in this NLRB forum, we must decide what the Respondent should have paid Tritone. The Respondent's workers' compensation program was a term and condition of employment and, as such, provides additional support for a finding that Tritone was entitled to be paid the glazier rate of pay.

In sum, the General Counsel provided substantial evidence supporting that, but for the Respondent's unfair labor practices, employee Tritone would have been paid at a glazier's rate of pay. The Respondent failed to demonstrate that the compliance specification was in error. Accordingly, we adopt the judge's finding that James Tritone was entitled to the contractual glazier rate of $22.05 per hour for the period from March 28 to April 15, 1994.

ORDER

The National Labor Relations Board adopts the recommended Order of the Administrative Law Judge as modified below and orders that the Re-

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[3] The Respondent's March 21 letter to Tritone—with its reference to reinstating Tritone to a "temporary modified duty position" for 45 days—was fully consistent with and suggested that the Respondent was applying the "full wages" provision of its workers' compensation program to Tritone.

spondent, Harding Glass Co., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall make payments to the individuals and funds listed below, with interest.

The backpay to employees is as follows:

Robert Mosely	$9,497.48 plus interest
James Tritone	$975.89 plus interest
Richard Poirer	$70,345.89 plus interest
James Gabrielle	$18,846.38 plus interest
Richard VonMerta	$11,273.69 plus interest
David Elworthy	$6,979.14 plus interest
Mark Zaltberg	0
Christoper Carle	$4,057.24 plus interest
Christoper Pelletier	$16,191.19 plus interest
Kenneth Bullock	$5,908.05 plus interest

The payments due to the union funds are as follows:

Health and welfare Fund	$181,994.31 plus interest
Pension Fund	$87,735.79 plus interest
Annuity Fund	$85,914.46 plus interest
Apprenticeship Fund	$4,422.81 plus interest

Dated, Washington, D.C. August 29, 2006

Robert J. Battista
Chairman

Wilma B. Liebman
Member

MEMBER SCHAUMBER, dissenting in part.

I agree with my colleagues in all respects save one. I would reverse the judge's finding that discriminatee Tritone's backpay should be calculated at the glazier's rate of $22.05 per hour.

Tritone began working for the Respondent as a glazier in 1988. In that capacity, he fabricated frames and doors, measured and cut glass, and installed windows and doors in storefronts. In April 1993, he suffered a severe wrist injury and was unable to work for approximately 8 weeks. From the date of his return through October 18, when the strike commenced, Tritone continued to perform his regular glazier duties, albeit under continuing medical care for his injury.

On January 31, 1994, the Respondent wrote to Tritone and offered him reemployment to a modified duty (light work) job that would entail, among other duties, measuring storefronts, repairing house windows, polishing small pieces of glass, and installing door closures. The Respondent's letter indicated that Tritone would be paid at the "current glazier's pay rate which is $13.73 per hour." Tritone, through his workers' compensation counsel, rejected that job offer as inconsistent with the medical restrictions imposed by his doctor. Thereafter, on March 15, the Respondent sent Tritone a second offer, this one for a "permanent light duty full-time position consisting of calling on prospective customers, measuring work at jobsites, picking up and delivering customers' automobiles." The stated wage rate for the position

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One of the unlawful unilateral changes made by the Respondent on October 23, 1993 was a reduction of the glazier's rate from $22.05 per hour to $13.73.

was $13.73 per hour. Tritone accepted the second offer. On March 21, before Tritone returned to work, the Respondent sent him a letter clarifying that its offer was for a "temporary modified duty position." The letter listed the job duties set out in the March 15 letter, but added "general office procedures," and also stated that the position was available for 45 days "at which time we will evaluate your ability to perform your regular duties as a glazier."

When Tritone returned to work, he saw a posted notice describing the Respondent's workers' compensation program. The notice indicated that "[m]odified duty is temporary (no longer than 45 days). It is a process that provides full wages for an injured employee during recovery. . . ." The notice also stated that an injured employee who was unable to perform his duties would be transferred to another position—if one was available and he was qualified for it—and would "retain full seniority rights and wages."

The judge found that the work Tritone performed between March 28 and April 15 was "substantially different from the work" that he had performed as a glazier, but nonetheless determined that Tritone's backpay for that period should be calculated at the glazier's rate of $22.05 per hour. None of the reasons stated by the judge for reaching that conclusion is persuasive.

First, the judge noted that in the underlying unfair labor practice case, the Board found that the Respondent had violated the Act by unilaterally changing the glaziers' and glassworkers' wage rates. The judge then determined that when these employees returned to work after their strike, they had to be paid their wage rate before thE unilateral

change, namely $22.05 per hour. Had Triton returned to a glazier's position, the judge would have been correct. However, as the judge himself found, Tritone—because of his physical limitations—could not perform the duties of a glazier and returned to work that was "substantially different from the work that he had previously performed." Because Tritone did not, an could not, perform the work of a glazier, the judge had no basis for awarding Tritone backpay at the glazier's rate.

Second, the judge noted that the Respondent's March 21 letter said that the position was available for 45 days "at which time we will evaluate your ability to perform your regular duties as a glazier." The judge did not indicate, however, what significance he drew from that statement. Fairly read, the letter simply states that after 45 days the Respondent would evaluate whether Tritone could perform glazier duties. The statement has no impact no whether Tritone should have received the $22.05 per hour glazier rate during the March 28-April 15 period when he was performing "substantially different" duties.

The judge also appeared to find it significant that the Respondent's January 31 offer of employment—which Tritone flatly rejected through his counsel—referred to the offered pay rate of $13.73 per hour as the "current glazier's pay rate." He noted that rate had been unlawfully set and should have been $22.05 per hour. The Respondent did have an obligation to offer the glazier rate of $22.05 per hour—but only if it were offering glazier work. In its January 31 letter, it was not offering such work to Tritone and accordingly its reference to the "current glazier's pay rate" in that letter is of no legal significance. Moreover, Tritone rejected the position offered on January 31, and the subsequent offer letter for a different position, which Tritone accepted, made no reference to a glazier's rate.

The judge's final basis for finding that Tritone was due $22.05 per hour was a brief reference to the modified duty policy notice that Tritone saw when he returned to work. That notice recited several "goals" of the Respondent's workers' compensation program, one of which was to return employees to full duty in the work force as soon as possible. To help achieve those goals, the notice states that the Respondent had instituted a modified duty policy, which "is a process that provides full wages for an injured employee during recovery . . ." Presumably, the judge believed that entitled Tritone to the glazier's rate of $22.05 per hour. However, whatever difference there may be between the language of the notice and what Tritone was paid is a matter for the State agency governing workers' compensation claims, and not the Board. If there was a failure by the Respondent to adhere to its workers' compensation obligations, that is an issue for another forum. The facts here clearly show that Tritone was not recalled to a glazier position and, thus, the Respondent was not obligated, under the specific terms of the Board's Order in the underlying unfair labor practice proceeding, to pay Tritone at the glazier's rate. Therefore, I would reverse the judge's determination that Tritone should have been paid at the glazier's rate of $22.05 per hour from March 28 to April 15.

Dated, Washington, D.C. August 29, 2006

Peter C. Schaumber
Member

Karen Hickey, Esq. and Sandra Clodomir, Esq., for the General Counsel.

Robert Weihrauch, Esq. for the Respondent.

Michael Feinberg, Esq.Feinberg, Campbell & Zack, P.C.), for Charging Party.

SUPPLEMENTAL DECISION

JOEL P. BIBLOWITZ, Administrative Law Judge.

This case was heard by me on May 2, 2005 in Boston, Massachusetts. The third amended compliance specification, which issued on January 19, 2005, alleges that Harding Glass Company, Inc. (the Respondent) owes the amount of $504,142.32 plus interest accrued to the date of payment. This amount is due as wages to Robert Mosely, James Tritone, Richard Poirer, James Gabrielle, Richard VonMerta, David Elworthy, Christopher Carle, Christopher Pelletier, and Kenneth Bullock as well as to the following funds of Glaziers Local 1044, International Brotherhood of Painters & Allied Trades, AFL-CIO (the Union): the Health and Welfare Fund, the Pension Fund, the Annuity Fund and the Apprenticeship Fund.

I. BACKGROUND

On March 31, 1995, the Board issued the underlying Decision and Order herein at 316 NLRB 985, finding that the Respondent violated Section 8(a)(5) of the Act by unlawfully implementing, as its last and final offer, certain unilateral changes in its employees' terms of employment, effective on October 23, 1993, and that this change was made in the absence of a valid impasse in bargaining. On March 17, 1996, the United States Court of Appeals for the First Circuit enforced this portion of the Board's

Order, and directed the Respondent to restore all terms and conditions of employment to the status quo as it existed on October 23, 1993, and to make whole all employees, and the Union funds, with interest, for any loss they may have suffered as a result of Respondent's unlawful unilateral changes. The Court, however, declined to adopt the Board's additional finding that the economic strike which began on October 18, 1993 was converted to an unfair labor practice strike on October 25, 1993, and therefore denied enforcement of that portion of the Board's Order.

Counsel for the Respondent, in his answer to the amended compliance specification which issued on January 20, 2000, included numerous defenses which counsel for the General Counsel felt were improper because they contravened the Board and the Court's findings. Counsel for the General Counsel notified counsel for the Respondent that his answer failed to meet the requirements of Section 102.56 of the Board's Rules and Regulations and that General Counsel would file a Motion for Partial Summary Judgment if the Respondent did not file an appropriate amended answer. On May 19, 2000, Counsel for the General Counsel filed with the Board a motion to strike portions of the Respondent's first amended answer to the original amended compliance specification and for partial summary judgment. On August 1, 2002, the Board issued a Supplemental Decision and Order (at 337 NLRB 1116), finding that the Respondent's Answer did not comply with the requirements of Section 102.56(b) and (c) of the Board's Rules and Regulations and that all of the Respondent's affirmative defenses were without merit. The Board therefore ordered that the Respondent's affirmative defenses be stricken, and granted

the General Counsel's Motion for Partial Summary Judgment with respect to paragraphs 1 through 10 and 12 through 21 of the amended compliance specification, relating to the backpay period and the backpay calculations for all the employees. Pursuant to this decision, the only issues that Respondent could litigate were the amount of interim earnings and expenses of each of the employees and the status of James Tritone.

II. THE FACTS AND ANALYSIS

A. Interim Earnings

Regardless of the large amount of backpay and money due to the named employees and the Union funds herein, the hearing was extremely limited because of the Board's Supplemental Decision on counsel for the General Counsel's motion to strike. Even the issue of interim earnings, which normally would produce extensive testimony regarding the adequacy of the search for replacement employment and the wages therein is not a factor here because of the nature of the violation, and the fact that the interim employment was with the Respondent. As no evidence was introduced to contradict the interim earnings set forth in the Third Amended Compliance Specification, I find that the amounts set forth therein are correct.

B. The Strike

The economic strike began on October 18, 1993. At the time, the Respondent employed five unit employees, two glaziers, Tritone and Charles Jones, and three glass workers, including Mosely. Tritone and Mosely are the only employees employed by the Respondent at that time who are named. All of the glass workers returned to work after being on strike

for 1 week. Jones never returned to Respondent's employ and obtained employment as a glazier elsewhere. As will be discussed, infa, Tritone returned from workmens' compensation status to work for the Respondent on March 28, 1994 and worked until April 15, 1994, when he returned to workmens' compensation status and filed for, and received, social security disability benefits. Of the other eight employees named in the compliance specification, five are glass workers and three are glaziers. The Union has separate contracts with the Respondent and other employers for glass workers and glaziers. Glass workers often perform inside fabrication work and residential and automobile glass replacement work, while glaziers measure, fabricate and install glass windows for storefronts and commercial customers. The hourly rate set forth for glaziers in the Glaziers' 1991-1993 contract was $22.05; the hourly rate for glass workers in the 1991-1993 Glass Workers' contract was $13.23.

The compliance specifications provide that backpay of the named replacement employees commenced on June 5, 1996, because the Union notified the Respondent on June 4, 1996, that the strike was terminated at that time. The basis of this finding is the June 4, 1996 letter that Union Business Manager sent to Robert Weihrauch, Esq., counsel for the Respondent. The letter states, inter alia:

> It is Local 1044's position that by January 1, 1994 its strike against Harding Glass was concluded. By that date, all striking employees (i.e. the glaziers) who were able to work had found other jobs and were not seeking reinstatement with Harding Glass. In addition, by

that date Local 1044 had ceased its picketing at Harding Glass.

As no substantive evidence was introduced to contradict the assertions contained in this letter, I agree with counsel for the General Counsel's position that the Union's economic strike commenced on October 18, 1993, and concluded on June 4, 1996, and that the backpay period for the replacement workers began on the following day.

C. The Status of James Tritone

The only issue remaining for consideration, pursuant to the Board's Supplemental Decision and Order, is Tritone's status. The issue is whether he should have been paid as a glazier, his job classification prior to the strike, or as a glass worker for the period that he worked from March 28 to April 15, 1994. The difference is the contractual rate contained in the 1991-1993 contract, for glaziers, $22.05 an hour, or for glass workers, $13.23 an hour. For the 3- week period that Tritone worked for the Respondent in 1994 he was paid $13.73 an hour, without any union benefits. Tritone began working for the Respondent as a glazier in 1988. As a glazier, he fabricated frames and doors, measured and cut glass and installed windows and doors in store fronts. In April 1993 he severed his wrist, cut a tendon and shred the nerves in his wrist. From that time through October 18, 1993, he was performing his regular glazier duties, although he was under medical care for his injury. The picketing of the Respondent's facility commenced on October 18, 1993, the same day that he had surgery on his wrist. He joined the strike and picketing on that day and did not return to work until March 28, 1994.

On January 31, 1994, Mark Goldstein, Respondent's owner, wrote to Tritone that Tritone's doctor indicated that he could return to work on a modified light duty program. The letter continued:

> We are offering you a modified duty (light work) job measuring storefronts, repairing house windows, polishing small pieces of glass, installing door closures, to name a few.
>
> We are offering you 100% of our current glaziers pay rate which is $13.73 per hour with Blue Cross HMO as health coverage paid by Harding Glass Co. Our desire is that, under strict medical supervision, you return to work with job restrictions, immediately.
>
> Please indicate below whether you accept or reject the offer of modified-duty employment as described herein. If we do not hear from you by February 11, 1994, we will assume you have rejected our offer and will proceed accordingly.

Tritone testified that he believes that his lawyer wrote to Goldstein saying that the job offered did not comport with the restriction imposed by his doctor. In response, Goldstein wrote to Tritone on March 15, 1994 stating:

> We are pleased to offer you a permanent light duty full time position consisting of calling on prospective customers, measuring work at job sites, picking up and delivering customers' automobiles. Your wage will be $13.73 per hour plus an employer paid Blue Cross/Blue Shield HMO.
>
> We must hear from you on or before March 24, 1994, otherwise, we will assume you have re-

jected our offer. Tritone testified that he believes that his attorney notified the Respondent that he would accept that job offer, and by letter dated March 21, 1994, Goldstein again wrote to Tritone, stating:

> We would like to clarify the position that is available to you beginning March 28, 1994.This is a temporary modified duty position consisting of calling on prospective customers, measuring work at jobsites, picking up and delivering customer's automobiles, and general office procedures.
>
> This position is available for forty five days at which time we will evaluate your ability to perform your regular duties as a glazier.

We look forward to seeing you on March 28, 1994.

On his first day of work upon returning, March 28, 1994, he saw a notice posted at the time clock. He had never seen it during the period of his prior employment with the Respondent. Entitled: "Modified-Duty Policy," it states, inter alia:

> Harding Glass Co., Inc. workers' compensation program has several distinct goals.
>
> 1. To provide employees with prompt, high quality care for their work-related injuries;
>
> 2. To compensate workers during the time they are disabled and unable to work; and
>
> 3. To return injured employees to full duty in the work force as soon as possible.
>
> To help us achieve these goals, we have instituted a modified-duty policy. Modified duty is temporary (no longer than 45 days). It is a proc-

ess that provides full wages for an injured employee during recovery. . .

Management Rights

Job transfer: Any employee who, as a result of an accident on or off the job, or chronic disease or condition, is unable to perform his/her duties, shall be transferred to another position if work is available for which he/she is qualified or can be retrained within a reasonable period of time. He/she shall retain lull seniority rights and wages.

The work that Tritone performed from March 28 through April 15, 1994, was substantially different from the work that he had previously performed for the Respondent. During this earlier period, the principal work that he performed was fabricating and installing store front glass windows and doors. So that, if a glass door or window at a store or other commercial facility was broken, or had to be replaced for any other reason, he measured the area, cut the replacement glass and, probably with another employee, installed the new glass door or window. For the period March 28 to April 15, 1994, he measured store fronts and, occasionally, picked up a car and drove it back to Respondent's shop where the glass workers performed the required repairs. The only "tools" that he carried were a tape measure, a ruler, paper and a pencil; he no longer carried, or used, a glass cutter. Goldstein testified that his workmens' compensation insurance company told him to put Tritone back to work on light temporary job duty. He had Tritone measure doors and windows of his existing customers, so that, if one of the customers subsequently called in to report a broken window or door, they would know the size involved and could replace it without further measurement.

This work was performed in anticipation of possible future work from his existing customers.

An examination of Tritone's work classification, background and the work that he performed during this 3- week period presents a difficult issue of whether he should be paid at the glaziers' hourly rate of $22.05 or the glass workers' rate of $13.23. He was a glazier and had been paid at that rate during the 5 years of his employment with the Respondent. However, it is also clear that the work that he performed from March 28 through April 15, 1994, was less than classic glazier work. The only glazier-type work that he performed during this period was measuring storefronts and doors for possible future glass replacement. However, I do not believe that it is necessary to examine his work during this period to determine the wage rate that he should have been paid. The Board's Decision and Order found that the Respondent violated the Act by unilaterally changing the wage rates of its glaziers and glass workers. Therefore, when these employees returned to work they had to be paid the wage rate prior to the unilateral change. Tritone was a glazier whose hourly wage rate was $22.05 prior to the change, and that is the rate he had to be paid upon returning. In addition, Respondent's documents herein support counsel for the General Counsel's allegations on this issue. Goldstein's January 31, 1994 letter to Tritone offering him reinstatement, states that it would be at ". . . 100% of our current glazier's pay rate which is $13.73 per hour. . ." However, that hourly rate was found to have been unlawfully instituted by the Respondent, and should have been $22.05. In addition, Goldstein's reinstatement offer of March 21, 1994 states: "This position is available for forty five days at which time we will evaluate your ability to

perform your regular duties as a glazier." And finally, the notice that Tritone found at the Respondent's facility when he returned to work on March 28, 1994, in describing the Respondent's workmens' compensation program, stated that it provided "full wages" and "full seniority rights and wages" for the injured employee, I therefore find that Tritone should have been paid at the glaziers' hourly wage rate of $22.05 for the period March 28, 1994 through April 15, 1994.

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended

ORDER

The Respondent, Harding Glass Company, Inc., its officers, agents, successors and assigns, shall make payments to the individuals and funds listed below, with interest.

The backpay to employees is as follows:

Robert Mosely	$9,497.48 plus interest
James Tritone	$975.89 plus interest
Richard Poirer	$70,345.89 plus interest
James Gabrielle	$18,846.38 plus interest
Richard VonMerta	$11,273.69 plus interest
David Elworthy	$6,979.14 plus interest
Mark Zaltberg	0
Christoı er Carle	$4,057.24 plus interest
Christoper Pelletier	$16,191.19 plus interest
Kenneth Bullock	$5,908.05 plus interest

If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

The payments due to the union funds are as follows:

Health and welfare Fund	$181,994.31 plus interest
Pension Fund	$87,735.79 plus interest
Annuity Fund	$85,914.46 plus interest
Apprenticeship Fund	$4,422.81 plus interest

Dated, Washington, D.C. June 29, 2005

APPENDIX C

NATIONAL LABOR RELATIONS BOARD
Division of Judges
New York Branch Office

Case Nos. 1-CA-31148
1-CA-31158
JD(NY)-25-05
Worcester, MA

HARDING GLASS COMPANY, INC. and GLAZIERS LOCAL 1044, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO

June 29, 2005

Karen Hickey, Esq., and Sandra Clodomir, Esq., Counsel for the General Counsel.

Michael Feinberg, Esq., Feinberg, Campbell & Zack, P.C., Counsel for Charging Party.

Robert Weihrauch, Esq., Counsel for the Respondent.

SUPPLEMENTAL DECISION

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on May 2, 2005 in Boston, Massachusetts. The Third Amended Compliance Specification, which issued on January 19, 2005, alleges that Harding Glass Company, Inc., herein the Respondent, owes the amount of $504,142.32 plus interest accrued to the date of payment. This amount is due as wages to Robert Mosely, James Tritone, Richard Poirer, James Gabrielle, Richard VonMerta,

David Elworthy, Christopher Carle, Christopher Pelletier and Kenneth Bullock as well as to the following funds of Glaziers Local 1044, International Brotherhood of Painters & Allied Trades, AFL-CIO, herein called the Union: the Health and Welfare Fund, the Pension Fund, the Annuity Fund and the Apprenticeship Fund.

I. Background

On March 31, 1995, the Board issued the underlying Decision and Order herein at 316 NLRB 985, finding that the Respondent violated Section 8(a)(5) of the Act by unlawfully implementing, as its last and final offer, certain unilateral changes in its employees' terms of employment, effective on October 23, 1993, and that this change was made in the absence of a valid impasse in bargaining. On March 17, 1996, the United States Court of Appeals for the First Circuit enforced this portion of the Board's Order, and directed the Respondent to restore all terms and conditions of employment to the status quo as it existed on October 23, 1993, and to make whole all employees, and the Union funds, with interest, for any loss they may have suffered as a result of Respondent's unlawful unilateral changes. The Court, however, declined to adopt the Board's additional finding that the economic strike which began on October 18, 1993 was converted to an unfair labor practice strike on October 25, 1993, and therefore denied enforcement of that portion of the Board's Order.

Counsel for the Respondent, in his Answer to the Amended Compliance Specification which issued on January 20, 2000, included numerous defenses which Counsel for the General Counsel felt were improper because they contravened the Board and the Court's

findings. Counsel for the General Counsel notified counsel for the Respondent that his Answer failed to meet the requirements of Section 102.56 of the Board's Rules and Regulations and that General Counsel would file a Motion for Partial Summary Judgment if the Respondent did not file an appropriate amended answer. On May 19, 2000, Counsel for the General Counsel filed with the Board a Motion to Strike Portions of the Respondent's First Amended Answer to the Original Amended Compliance Specification and for Partial Summary Judgment. On August 1, 2002, the Board issued a Supplemental Decision and Order (at 337 NLRB 1116), finding that the Respondent's Answer did not comply with the requirements of Section 102.56(b) and (c) of the Board's Rules and Regulations and that all of the Respondent's Affirmative Defenses were without merit. The Board therefore ordered that the Respondent's affirmative defenses be stricken, and granted the General Counsel's Motion for Partial Summary Judgment with respect to paragraphs 1 through 10 and 12 through 21 of the amended compliance specification, relating to the backpay period and the backpay calculations for all the employees. Pursuant to this Decision, the only issues that Respondent could litigate were the amount of interim earnings and expenses of each of the employees and the status of James Tritone.

II. The Facts and Analysis

A. Interim Earnings

Regardless of the large amount of backpay and money due to the named employees and the Union funds herein, the hearing herein was extremely limited because of the Board's Supplemental Decision on Counsel for the General Counsel's Motion to

Strike. Even the issue of interim earnings, which normally would produce extensive testimony regarding the adequacy of the search for replacement employment and the wages therein is not a factor here because of the nature of the violation, and the fact that the interim employment was with the Respondent. As no evidence was introduced to contradict the interim earnings set forth in the Third Amended Compliance Specification, I find that the amounts set forth therein are correct.

B. The Strike

The economic strike herein began on October 18, 1993. At the time, the Respondent employed five unit employees, two glaziers, Tritone and Charles Jones, and three glass workers, including Mosely. Tritone and Mosely are the only employees employed by the Respondent at that time who are named herein. All of the glass workers returned to work after being on strike for one week. Jones never returned to Respondent's employ and obtained employment as a glazier elsewhere. As will be discussed, *infa*, Tritone returned from Workmens' Compensation status to work for the Respondent on March 28, 1994 and worked until April 15, 1994, when he returned to Workmens' Compensation status and filed for, and received, Social Security disability benefits. Of the other eight employees named in the Compliance Specification, five are glass workers and three are glaziers. The Union has separate contracts with the Respondent and other employers for glass workers and glaziers. Glass workers often perform inside fabrication work and residential and automobile glass replacement work, while glaziers measure, fabricate and install glass windows for store fronts and commercial customers. The hourly rate set forth

for glaziers in the Glaziers' 1991-1993 contract was $22.05; the hourly rate for glass workers in the 1991-1993 Glass Workers' contract was $13.23.

The Compliance Specifications provide that backpay of the named replacement employees commenced on June 5, 1996, because the Union notified the Respondent on June 4, 1996 that the strike was terminated at that time. The basis of this finding is the June 4, 1996 letter that Union Business Manager sent to Robert Weihrauch, Esq., counsel for the Respondent. The letter states, *inter alia*:

It is Local 1044's position that by January 1, 1994 its strike against Harding Glass was concluded. By that date, all striking employees (i.e. the glaziers) who were able to work had found other jobs and were not seeking reinstatement with Harding Glass. In addition, by that date Local 1044 had ceased its picketing at Harding Glass.

As no substantive evidence was introduced to contradict the assertions contained in this letter, I agree with Counsel for the General Counsel's position that the Union's economic strike commenced on October 18, 1993 and concluded on June 4, 1996 and that the backpay period for the replacement workers began on the following day.

C. The Status of James Tritone

The only issue remaining for consideration, pursuant to the Board's Supplemental Decision and Order, is Tritone's status. The issue is whether he should have been paid as a glazier, his job classification prior to the strike, or as a glass worker for the period that he worked from March 28 to April 15, 1994. The difference is the contractual rate contained in the 1991-1993 contract, for glaziers,

$22.05 an hour, or for glass workers, $13.23 an hour. For the three week period that Tritone worked for the Respondent in 1994 he was paid $13.73 an hour, without any Union benefits. Tritone began working for the Respondent as a glazier in 1988. As a glazier, he fabricated frames and doors, measured and cut glass and installed windows and doors in store fronts. In April 1993 he severed his wrist, cut a tendon and shred the nerves in his wrist. From that time through October 18, 1993 he was performing his regular glazier duties, although he was under medical care for his injury. The picketing of the Respondent's facility commenced on October 18, 1993, the same day that he had surgery on his wrist. He joined the strike and picketing on that day and did not return to work until March 28, 1994.

On January 31, 1994, Mark Goldstein, Respondent's owner, wrote to Tritone that Tritone's doctor indicated that he could return to work on a modified light duty program. The letter continued:

> We are offering you a modified duty (light work) job measuring storefronts, repairing house windows, polishing small pieces of glass, installing door closures, to name a few.
>
> We are offering you 100% of our current glaziers pay rate which is $13.73 per hour with Blue Cross HMO as health coverage paid by Harding Glass Co. Our desire is that, under strict medical supervision, you return to work with job restrictions, immediately.
>
> Please indicate below whether you accept or reject the offer of modified-duty employment as described herein. If we do not hear from you by February 11, 1994, we will assume you have rejected our offer and will proceed accordingly.

Tritone testified that he believes that his lawyer wrote to Goldstein saying that the job offered did not comport with the restriction imposed by his doctor. In response, Goldstein wrote to Tritone on March 15, 1994 stating:

> We are pleased to offer you a permanent light duty full time position consisting of calling on prospective customers, measuring work at job sites, picking up and delivering customers' automobiles. Your wage will be $13.73 per hour plus an employer paid Blue Cross/Blue Shield HMO.
>
> We must hear from you on or before March 24, 1994, otherwise, we will assume you have rejected our offer.

Tritone testified that he believes that his attorney notified the Respondent that he would accept that job offer, and by letter dated March 21, 1994, Goldstein again wrote to Tritone, stating:

> We would like to clarify the position that is available to you beginning March 28, 1994.This is a temporary modified duty position consisting of calling on prospective customers, measuring work at jobsites, picking up and delivering customer's automobiles, and general office procedures.
>
> This position is available for forty five days at which time we will evaluate your ability to perform your regular duties as a glazier.
>
> We look forward to seeing you on March 28, 1994.

On his first day of work upon returning, March 28, 1994, he saw a notice posted at the time clock. He had never seen it during the period of his prior

employment with the Respondent. Entitled: "Modified-Duty Policy," it states, *inter alia*:

> Harding Glass Co., Inc. workers' compensation program has several distinct goals.
>
> 1. To provide employees with prompt, high quality care for their work-related injuries;
>
> 2. To compensate workers during the time they are disabled and unable to work; and
>
> 3. To return injured employees to full duty in the work force as soon as possible.
>
> To help us achieve these goals, we have instituted a modified-duty policy. Modified duty is temporary (no longer than 45 days). It is a process that provides full wages for an injured employee during recovery. . .

Management Rights

Job transfer: Any employee who, as a result of an accident on or off the job, or chronic disease or condition, is unable to perform his/her duties, shall be transferred to another position if work is available for which he/she is qualified or can be retrained within a reasonable period of time. He/she shall retain full seniority rights and wages.

The work that Tritone performed from March 28 through April 15, 1994 was substantially different from the work that he had previously performed for the Respondent. During this earlier period, the principal work that he performed was fabricating and installing store front glass windows and doors. So that, if a glass door or window at a store or other commercial facility was broken, or had to be replaced for any other reason, he measured the area, cut the replacement glass and, probably with another em-

ployee, installed the new glass door or window. For the period March 28, 1994 to April 15, 1994, he measured store fronts and, occasionally, picked upa car and drove it back to Respondent's shop where the glass workers performed the required repairs. The only "tools" that he carried were a tape measure, a ruler, paper and a pencil; he no longer carried, or used, a glass cutter. Goldstein testified that his Workmens Compensation insurance company told him to put Tritone back to work on light temporary job duty. He had Tritone measure doors and windows of his existing customers, so that, if one of the customers subsequently called in to report a broken window or door, they would know the size involved and could replace it without further measurement. This work was performed in anticipation of possible future work from his existing customers.

An examination of Tritone's work classification, background and the work that he performed during this three week period presents a difficult issue of whether he should be paid at the glaziers' hourly rate of $22.05 or the glass workers' rate of $13.23. He was a glazier and had been paid at that rate during the five years of his employment with the Respondent. However, it is also clear that the work that he performed from March 28, 1994 through April 15, 1994 was less than classic glazier work. The only glazier-type work that he performed during this period was measuring store fronts and doors for possible future glass replacement. However, I do not believe that it is necessary to examine his work during this period to determine the wage rate that he should have been paid. The Board's Decision and Order found that the Respondent violated the Act by unilaterally changing the wage rates of its glaziers and glass workers. Therefore, when these employees

returned to work they had to be paid the wage rate prior to the unilateral change. Tritone was a glazier whose hourly wage rate was $22.05 prior to the change, and that is the rate he had to be paid upon returning. In addition, Respondent's documents herein support Counsel for the General Counsel's allegations on this issue. Goldstein's January 31, 1994 letter to Tritone offering him reinstatement, states that it would be at ". . . 100% of our current glazier's pay rate which is $13.73 per hour..." However, that hourly rate was found to have been unlawfully instituted by the Respondent, and should have been $22.05. In addition, Goldstein's reinstatement offer of March 21, 1994 states: "This position is available for forty five days at which time we will evaluate your ability to perform your regular duties as a glazier." And finally, the notice that Tritone found at the Respondent's facility when he returned to work on March 28, 1994, in describing the Respondent's Workmens' Compensation program, stated that it provided "full wages" and "full seniority rights and wages" for the injured employee. I therefore find that Tritone should have been paid at the glaziers' hourly wage rate of $22.05 for the period March 28, 1994 through April 15, 1994.

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended[1]

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Harding Glass Company, Inc., its officers, agents, successors and assigns, shall make payments to the individuals and funds listed below, with interest.

The backpay to employees is as follows:

Robert Mosely	$9,497.48 plus interest
James Tritone	$975.89 plus interest
Richard Poirer	$70,345.89 plus interest
James Gabrielle	$18,846.38 plus interest
Richard VonMerta	$11,273.69 plus interest
David Elworthy	$6,979.14 plus interest
Mark Zaltberg	0
Christopher Carle	$4,057.24 plus interest
Christopher Pelletier	$16,191.19 plus interest
Kenneth Bullock	$5,908.05 plus interest

The payments due to the Union funds is as follows:

Health and Welfare Fund	$181,994.31 plus interest
Pension Fund	$87,735.79 plus interest
Annuity Fund	$85,914.46 plus interest
Apprenticeship Fund	$4,422.81.81 plus interest

Dated, Washington, D.C. June 29, 2005

Joel P. Biblowitz
Administrative Law Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 95-1727

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HARDING GLASS COMPANY, INC.,
Respondent.

March 27, 1996, Decided

JUDGES: Before Selya, *Circuit Judge*, Aldrich and Coffin, *Senior Circuit Judges*.

OPINION

COFFIN, *Senior Circuit Judge*. The National Labor Relations Board seeks enforcement of its order finding that Harding Glass Company committed a series of unfair labor practices and that an economic strike against the Company was converted to an unfair labor practice strike following Harding's unilateral implementation of its final offer. We affirm most of the Board's order but conclude that the record lacks substantial evidence to support its finding that the strike was converted. We therefore grant in part, and deny in part, the Board's application for enforcement.[1]

[1] The Company does not challenge several of the Board's findings of violation of § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), including that (1) it interfered in the Board's investigation of unfair labor practice charges; (2) that it

I. *Background*

Harding Glass ("the Company") is a small business in Worcester, Massachusetts that specializes in auto glass replacement, small construction and other similar glass-related projects. In mid-1993, when the events relevant to this case began, the Company employed three glassworkers and two glaziers. The glaziers were more highly paid and performed more skilled work. The Company and the Union that represented these five workers, Glaziers Local 1044 of the International Brotherhood of Painters and Allied Trades, AFL-CIO ("the Union"), had a longstanding collective bargaining arrangement through a multi-employer association, the Glass Employers Group of Greater Boston.

The most recent agreement signed by the Company and the Union had an expiration date of October 16, 1993. On June 30, the Company's president, Mark Goldstein, notified the Union that he wished to negotiate a separate agreement to replace the group contract that was expiring. Goldstein was concerned that his company was not competitive in the Worcester area because other glass shops there were not paying the much higher Union wage and benefits.

The Union agreed to negotiate separately, and three meetings, each lasting about one hour, eventually were held. The Company proposed a one-year agreement that included substantial reductions in wages and benefits for the glaziers and an increase in the top rate for glassworkers, but with cuts in their benefits as well. During the discussions, the Union's

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threatened employees with discharge and promised them higher wages in order to discourage them from supporting or remaining members of the Union; (3) and that it encouraged and assisted employees in the filing of a decertification petition.

business manager suggested techniques for cutting the Company's costs, the most significant of which involved using the lower-paid glassworkers to do much of the work that the Company currently was paying glaziers to do. Goldstein maintained that he could not rely on glassworkers to do the skilled work normally done by glaziers.

On October 17, the glaziers rejected the Company's offer and voted to strike and establish a picket line, which they did the next day. The three glassworkers did not attend the meeting scheduled to discuss the Company's proposal to them, but they agreed not to cross the glaziers' picket line. The message sent to the Company rejecting its offer stated that the Union was "ready and willing to continue negotiations."

On October 22, Goldstein met with the three glassworkers and offered them the terms that had been contained in his proposal to the Union. The same day, the third negotiating session took place. No new proposals were made, but the parties again discussed the Union's suggestion that the Company use glassworkers for most of its business and rely on the Union hiring hall to provide glaziers when necessary. The business agent testified that the meeting ended with Goldstein saying that he would think about the Union's proposal and get back to him about it.

The next day, however, Goldstein rejected the Union's approach as "unacceptable," and announced that the Company was implementing its final offer—i.e., its original offer. The three glassworkers resigned from the Union and returned to work under the terms the Company had offered the Union: a small hourly wage increase, no pension and annuity benefits, modified health benefits, and fewer holidays.

No further negotiating sessions were held. The picket line remained in effect through December and, so far as the record indicates, the strike has to this date not been settled. The Union filed unfair labor practice charges against the Company, and, following a two-day hearing, an ALJ found multiple violations of the National Labor Relations Act and also determined that the strike was converted from an economic strike to an unfair labor practice strike. The Board, with minor modifications, affirmed.

On appeal, Harding challenges only two of the unfair labor practice findings: that Goldstein threatened employees with a shutdown of the business if they did not get rid of the Union and that the Company unilaterally implemented changes in employment conditions in the absence of a valid impasse in bargaining. The Company also contends that the record fails to demonstrate that the strike was prolonged by any of its conduct, and it therefore urges us to reject the finding of an unfair labor practice strike.

We find no basis for disturbing the Board's determination with respect to either of the unfair labor practice charges, and believe that the ALJ's discussion, as modified by the Board's decision and Order, adequately addresses these issues.[2] Our review of the

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[2] We note that, with respect to the alleged threats to close down the business, Dana Whitney, Charles Jones and James Tritone testified that such statements were made to them. *See* Tr. at 127, 205, 220. The ALJ evidently did not credit Goldstein's assertion that he made only lawful complaints about how the high union wages made him non-competitive. "Such credibility determinations, of course, are for the Board rather than for us to make, and they stand unless beyond the 'bounds of reason.'" *NLRB v. Magnesium Casting Co.*, 668 F.2d 13, 21 (1st Cir. 1981) (citation omitted). *See also The 3-E Company v. NLRB*, 26 F. 3d 1, 3 (1st Cir. 1994).

record, however, persuades us that the finding of a strike conversion cannot be sustained.[3] We discuss this issue in the following section.

II. *Discussion: Conversion of the Strike*

It is well-established that "[a] strike begun in support of economic objectives becomes an unfair labor practice strike when the employer commits an intervening unfair labor practice which is found to make the strike last longer than it otherwise would have," *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1079 (1st Cir. 1981). Causation is crucial: "It must be found not only that the employer committed an unfair labor practice after the commencement of the strike, but that as a result the strike was 'expanded to include a protest over [the] unfair labor practice[],' and that settlement of the strike was thereby delayed and the strike prolonged." *Id.* at 1079-80 (citations omitted).

The General Counsel bears the burden of proving causation, and the Board's finding of conversion must be supported by substantial evidence. *Id.* at 1080. Mere conjecture will not suffice. *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 977 (10th Cir. 1990). "To sustain a finding of conversion, there must be some evidence in the record that the . . . employees reacted

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[3] The nature of the strike determines the reinstatement rights of striking employees once the work stoppage ends. An employer may refuse to reinstate economic strikers who have been permanently replaced during the strike. Unfair labor practice strikers are entitled to unconditional reinstatement, absent a contractual or statutory provision to the contrary, and are entitled to back pay even if they have been replaced during the strike. *See General Indus. Employees Union Local 42 v. NLRB*, 293 U.S. App. D.C. 41, 951 F.2d 1308, 1311 (D.C. Cir. 1991); *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1105 (1st Cir. 1981).

to information of [the unfair labor practice] substantively in a fashion which aggravated or prolonged the strike." *Id.* It need not be shown, however, that the employer's unfair labor practice was the sole or even the primary factor in aggravating the strike, but only that it was "a contributing factor," *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 840 (5th Cir. 1978).

> Both objective and subjective factors may be probative of conversion. Applying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context. Applying subjective criteria, the Board and court may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice. Did they continue to view the strike as economic or did their focus shift to protesting the employer's unlawful conduct?

Soule Glass, 652 F.2d at 1080.

Applying these principles to the present case renders us unable to sustain the finding of conversion. The ALJ's discussion of this issue comprised a single brief paragraph within a three-page analysis of the Company's conduct. The decision stated in conclusory language that the Company's unilateral implementation of its final offer, together with its unlawful threats, promises and support of a decertification petition, "must" be found to have prolonged the strike, and converted it "to one which must be deemed an unfair labor practice strike." ALJ Op. at 9.[4]

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[4] We reproduce the ALJ's full discussion of the issue:

The Board affirmed the finding of conversion, but limited the basis for that determination to the Company's unlawful implementation of its last offer:

> Because the Respondent's initial bargaining proposal contained significant reductions in the compensation paid glaziers and caused them to strike on October 18, we conclude that the unlawful implementation of these very changes had a reasonable tendency to prolong the strike. Accordingly, we find that the strike converted to an unfair labor practice strike on October 25 when the striking glaziers became aware of the Respondent's unlawful implementation of its offer.

As their language reveals, both the ALJ and the Board *presumed* that the Company's implementation of the wage package that had triggered the strike aggravated and prolonged the work stoppage. Neither cites to testimony from the striking employees or any other evidence indicating that effectuation of the terms the employees had rejected strengthened their resolve to remain on strike or changed their attitude about the importance of a work stoppage in settling their differences with the Company. Our own reading

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Respondent's employees commenced an economic strike on October 18. On that same date, Respondent commenced upon a course of unilateral changes, changes which I have found occurred before any impasse in bargaining. Within two to three weeks, Respondent also began to undermine the Union's status among its employees, with threats, promises and unlawful support and encouragement of a decertification petition. Such conduct, I must find, prolonged the strike, which continues to this date, and converted that strike to one which must be deemed an unfair labor practice strike.

of the hearing transcript also reveals nothing of that nature.

We recognize that there are cases holding that some types of unfair labor practices inevitably impact the length of a strike. In *SKS Die Casting & Machining, Inc. v. NLRB*, 941 F.2d 984, 991 (9th Cir. 1991), the court adopted the Board's conclusion that a refusal to reinstate strikers "by its nature" prolonged the strike because it blocked the termination of the strike at a time when the Union and striking employees had offered unconditionally to end it. The panel observed that "to find conversion on this ground, it is not necessary to examine whether the Union was protesting the unfair labor practice at issue," and noted that the Board repeatedly had found that the refusal to reinstate strikers converts an economic strike into an unfair labor practices strike. *Id.* at 991-92.

The Eighth Circuit has made the same assumption of causation with respect to a withdrawal of recognition. *See Vulcan Hart Corp. (St. Louis Div.) v. NLRB*, 718 F.2d 269, 276 (8th Cir. 1983) ("Whatever goals the strikers hoped to accomplish by striking, V-H's withdrawal of recognition clearly prolonged the strike, because it put an end to contract negotiations."). *Accord C-Line Express*, 292 N.L.R.B. 638 (1989). Indeed, as noted above, we, too, have stated that the Board and reviewing court properly may consider objective criteria and evaluate "the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context." *Soule Glass*, 652 F.2d at 1080.

Always, however, the principal focus must remain on the element of causation, and specific, subjective evidence of changed motivation may be foregone only in those instances in which the objective factors by

themselves establish unequivocally that a conversion occurred. We do not believe that this is such a case.

The glaziers went on strike to protest the substantially reduced wage offer made to them. The Company's decision to implement that offer did not directly impact the strikers; they already were out of work and therefore were not being paid. Thus, although we think it possible that the glaziers took a harder line once the Company gave force to its offer by adopting it, and perhaps increased their resolve not to end the strike until they received a satisfactory offer, such an effect of the Company's action is not inevitable. It is just as likely that the Company's continuing adherence to the unacceptable proposal—the economic issue that triggered the strike—was what continued to fuel their protest.

Indeed, this case poses a somewhat unusual conversion question because the unfair labor practice is simply a reinforcement of the very conduct that caused the strike in the first place, rather than a collateral matter that may have added to the employees' dissatisfaction. The Board's obligation is to provide some basis for an inference that, in the aftermath of the implementation, the employees were separately motivated by that act. Were we to accept as adequate the Board's assertion that "the probable impact" of learning that the proposal had been implemented was "a reasonable tendency to prolong the strike," we would seriously diminish the causation requirement.[5]

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[5] The record here is notably different from that in *NLRB v. Powell Elec. Mfg. Co.*, 906 F.2d 1007, 1010 (5th Cir. 1990), which also involved the unilateral implementation of a final offer. There, the company began to implement its proposal after its attorney declared at the end of a negotiating meeting that in his opinion the parties had reached an impasse. The next day,

The cases noted above that have presumed causation are easily distinguishable. *See supra* at 8-9. When a company refuses to reinstate employees who have offered to end a strike, the cause and effect are obvious. Had the company not unlawfully refused to take back those workers, the employees presumably would have followed through on their intention to end the work stoppage. Similarly, a withdrawal of recognition by definition means the end of negotiations, which inevitably causes more than just "a reasonable tendency to prolong the strike" but an actual delay in its resolution. By contrast, when a company unilaterally implements its final offer prematurely, we think it less than apparent that the already ongoing strike has been prolonged by the company's *implementation* of the offer rather than by its persistence in offering such poor terms.[6] In short, we are reluctant to extend the principle of conversion-by-imputing-impact beyond those situations in which the link is unmistakable.

It would not have been difficult for the General Counsel to produce evidence, if it existed, that the employees were animated at least in part by the Company's unfair labor practice. Two of the striking glaziers testified at the hearing, as did the Union's

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union members met with their attorney, who told them that he believed impasse had not been reached and that the strike consequently had been converted to an unfair labor practice strike. He then asked the members if they wanted to continue the strike as an unfair labor practice strike, and the members present voted unanimously to do so. The strikers also modified their picket signs to reflect that the strike was directed against company unfair practices.

[6] If the Board had made a finding of bad faith bargaining, which it did not, this would be a different case. *See C-Line Express*, 292 N.L.R.B. 638 (1989).

business manager and business representative. Although counsel elicited testimony that the strikers were told of the Company's action, no questions were asked concerning the impact of that information on them. This gap is particularly significant in the absence of any manifestation of a change in outlook; the picket signs carried by the strikers, for example, simply announced the strike and did not explain its basis. *Cf. SKS Die Casting*, 941 F.2d at 992 (union changed picket signs to reflect reaction to unfair labor practices and distributed handbills to that effect); *NLRB v. Burkart Foam, Inc.*, 848 F.2d 825, 832 n.6 (7th Cir. 1988) (same). *See also NLRB v. Champ Corp.*, 933 F.2d 688, 694-95 (9th Cir. 1990).[7]

Because the record lacks evidence of "any concrete acts or affirmations" by the employees in response to the Company's unfair labor practice, *see Facet*, 907 F.2d at 977, and because we see no basis for presuming that the unilateral implementation of the terms that triggered the strike necessarily prolonged or intensified the work stoppage, we must reject the Board's finding of conversion.[8]

Accordingly, the Board's application for enforcement of its order is granted in part and denied in part.

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[7] In *Champ*, the unfair labor practice at issue was the discharge of certain striking employees, which prompted a unanimous vote of the union membership to remain on strike until all strikers were reinstated. 933 F.2d at 688. In addition, the union's negotiator informed the company's representative that the union could not agree to deny reinstatement to any person. The company's unlawful practice thus explicitly was identified as a barrier to settlement of the strike.

[8] The record is equally barren of evidence that other of the Company's unfair labor practices impacted the strike.

APPENDIX E

NATIONAL LABOR RELATIONS BOARD
(N.L.R.B.)

Cases 1-CA-31148 and 1-CA-31158

HARDING GLASS COMPANY, INC. and GLAZIERS LOCAL 1044, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO

March 31, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On November 3, 1994, Administrative Law Judge Michael O. Miller issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and con-

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

clusions as modified,[2] and to adopt the recommended Order as modified.

The judge found that the Respondent unlawfully implemented certain unilateral changes in employment conditions on October 18, 1993,[3] in the absence of a valid impasse in bargaining. He also found that these changes rendered the October 18 strike an unfair labor practice strike from its inception. We agree with the judge that the Respondent violated Section 8(a)(5) by unilaterally implementing its last and final offer in the absence of a valid impasse in bargaining.[4] However, we do not agree that this unlawful implementation occurred on October 18. Concededly, on that date, the Respondent unilaterally established a wage scale for replacement glaz-

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[2] The General Counsel excepts to the judge's failure to specifically order the Respondent to cease and desist from threatening employees with shop closure and to include such a provision in the notice to employees. The record supports the judge's factual findings that the Respondent's president, Mark Goldstein, repeatedly threatened employees within the 10(b) period, including on November 5, 1993, that he would close down if they did not get rid of the Union. We find merit in the General Counsel's exception and will modify the judge's conclusions of law, recommended Order, and notice accordingly.

We also find merit in the General Counsel's exception to the judge's failure to order the Respondent to reinstate unfair labor practice strikers on their unconditional offer to return to work. We will modify the judge's recommended remedy, Order, and notice accordingly.

[3] All dates are in 1993 unless otherwise indicated.

[4] In adopting the judge's finding that there was no valid impasse in bargaining prior to the Respondent's unilateral implementation of its offer, we do not rely on the Respondent's hiring of replacement glaziers on October 18 at reduced wages or on the Respondent's postimplementation sponsorship of the decertification effort.

iers. However, this action was lawful because the Respondent was privileged to establish unilaterally the terms and conditions of employment of strike replacements. *GHR Energy Corp.*, 294 NLRB 1011, 1012 (1989); *Service Electric Co.*, 281 NLRB 633, 642 (1986).[5]

We find that the Respondent's unlawful implementation became effective on October 23. On that day, the Respondent announced its intent to implement its final proposals as to the regular (i.e., nonreplacement) employees. On the same day, it implemented these changes.

Union representatives did not actually inform the striking glaziers of the Respondent's changes until

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[5] Member Browning does not agree with precedent holding that employers have no obligation to bargain about the terms and conditions of employment for striker replacements during the course of an economic strike. In her view, the employer's duty to bargain with the union encompasses all unit employees, including both the strikers and the replacements (as well as any nonstrikers and returning strikers who may be working), because all such employees are members of the bargaining unit. As part of its obligation to bargain with the union in good faith, the employer must maintain existing terms and conditions of employment during the pendency of negotiations until a lawful impasse is reached, at which point the employer is privileged to implement only those terms and conditions that are consistent with its last offer to the union. Member Browning believes that these principles should be applied to govern the terms and conditions of all unit employees, including replacement workers during an economic strike. Accordingly, in this case, she would find that the Respondent's unilateral establishment of a wage scale for the two replacement glaziers on October 18 was unlawful, because the scale differed from that offered to the Union in negotiations. Thus, the economic strike was converted to an unfair labor practice strike on the day that it commenced, October 18.

October 25. Because the Respondent's initial bargaining proposal contained significant reductions in the compensation paid glaziers and caused them to strike on October 18, we conclude that the unlawful implementation of these very changes had a reasonable tendency to prolong the strike. Accordingly, we find that the strike converted to an unfair labor practice strike on October 25 when the striking glaziers became aware of the Respondent's unlawful implementation of its offer.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 2.

"2. By threatening employees with discharge and/ or shop closure and by promising them higher wages in order to discourage them from supporting or remaining members of the Union, by interfering in the Board's investigation of unfair labor practices, and by encouraging and assisting employees in the filing of a decertification petition, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act."

2 2. Substitute the following for the judge's Conclusion of Law 5.

"5. The strike which began on October 18, 1993, converted to an unfair labor practice strike on October 25, 1993."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate

the policies of the Act. We have found that the economic strike that began on October 18, 1993, was converted to an unfair labor practice strike on October 25, 1993. Accordingly, the Respondent shall, on application, offer immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges, to all striking employees who were not permanently replaced before October 25, 1993.

Having found that by implementing its last contract proposal in the absence of a valid impasse, thereby unilaterally and unlawfully changing the terms and conditions of employment of the employees in the appropriate units, the Respondent shall, on request of the Union, restore the terms and conditions of employment which were in effect on October 23, 1993, and make its employees whole for any losses they experienced as a result of this unilateral action.[6]

Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing since October 23, 1993, to make contractually required payments to various benefit funds, the Respondent shall, on request of the Union, make whole its unit employees by making all payments that have not been made since October 23, 1993, and that would have been made but for the Respondent's unlawful failure to make them, including any additional amounts ap-

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[6] Where, as here, it is unclear whether an employer's unilateral changes in their entirety have been detrimental to employees or beneficial, the Board's customary policy is to issue a restoration order conditioned on the affirmative desires of the affected employees as expressed through their bargaining agent. *E.g., Dura-Vent Corp.*, 257 NLRB 430, 433 (1981).

plicable to such delinquent payments as determined in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make such required payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *enfd. mem.* 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[7] Nothing in our remedial order should be construed as authorizing the Respondent to take back benefits conferred without a request from the Union.

ORDER

The National Labor Relations Board orders that the Respondent, Harding Glass Company, Inc., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge or shop closure and promising them higher wages in order to discourage them from supporting or remaining members of the Union, interfering with the Board in its investigation of unfair labor practice

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[7] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

charges, and encouraging and assisting employees in the filing of a decertification petition.

(b) Unilaterally changing the terms and conditions of employment of its employees in the appropriate units without first bargaining to impasse with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, restore all terms and conditions of employment to the status quo as it existed on October 23, 1993.

(b) On request of the Union, make whole all employees for any losses they suffered as a result of the unilateral changes in terms and conditions of employment, with interest in the manner set forth in the remedy section of this decision.

(c) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate units concerning terms and conditions of employment and, if agreements are reached, embody those agreements in signed understandings:

> All glaziers employed by Respondent performing the work described in the preamble of the Glaziers Agreement between Glass Employers Group of Greater Boston, Inc., and the Union, which expired on October 16, 1993.
>
> All glassworkers employed by the Respondent as described in Article III of the Glass-

workers Agreement between Glass Employers Group of *987 Greater Boston, Inc., and the Union, which expired on October 16, 1993.

(d) On application, offer immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, to all those employees who went on strike on October 18, 1993, and were not permanently replaced prior to October 25, 1993, discharging if necessary any replacements hired on or after October 25, 1993.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Worcester, Massachusetts, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice. Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with loss of their jobs or shop closure or promise them higher wages in order to discourage them from supporting or remaining members of the Union.

WE WILL NOT interfere with the National Labor Relations Board in its investigation of unfair labor practice charges.

WE WILL NOT encourage or assist employees in the filing of a decertification petition.

WE WILL NOT unilaterally change the terms and conditions of employment of our employees without first bargaining to impasse with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request of the Union, restore all terms and conditions of employment to the status quo as it existed on October 23, 1993.

WE WILL, on request of the Union, make whole all our employees for any losses they suffered as a result of the unilateral changes in terms and conditions of employment, with interest.

WE WILL, on request, bargain collectively with the Union with respect to rates of pay, wages, hours of work, and other conditions of employment of employees represented by the Union in the appropriate units set forth below and, if agreements are reached, embody those agreements in signed understandings:

All glassworkers employed by us performing the work described in the preamble of the Glaziers Agreement between Glass Employers Group of Greater Boston, Inc., and the Union, which expired on October 16, 1993.

All glassworkers employed by us as described in Article III of the Glassworkers Agreement between Glass Employers Group of Greater Boston, Inc., and the Union, which expired on October 16, 1993.

WE WILL, on application, offer immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges to all those employees who went on

strike on October 18, 1993, and were not permanently replaced prior to October 25, 1993, discharging if necessary, any replacements hired on or after October 25, 1993.

HARDING GLASS COMPANY, INC.

Karen Hickey, Esq., for the General Counsel.

Robert Weirauch, Esq., for the Respondent.

James Farmer, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge.

This case was tried in Boston, Massachusetts, on July 13 and 14, 1994, based on charges filed on November 23 and 29, 1993, by Glaziers Local 1044, International Brotherhood of Painters & Allied Trades, AFL-CIO (the Union), as thereafter amended, and a consolidated complaint issued by the Regional Director for Region 1 of the National Labor Relations Board (the Board) on February 28, 1994, as thereafter amended. The complaint alleges that Harding Glass Company, Inc. (the Respondent or the Employer) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by making threats and promises to discourage continued union adherence, by encouraging and assisting employees in the filing of a decertification petition, by interfering with the Board's investigation of unfair labor practice charges, and by unilaterally implementing its contract offer in the absence of a bona fide

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All dates are 1993 unless otherwise indicated.

impasse in collective bargaining. Respondent's timely filed answer denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel and the Respondent, I make the following.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

The Respondent, a corporation, is engaged in the wholesale and retail sale and installation of glass for automobiles and commercial and industrial buildings at its facility in Worcester, Massachusetts. In the course and conduct of its business operations during the calendar year ending December 31, 1993, Respondent purchased and received goods and materials valued in excess of $50,000 which were shipped to it directly from points located outside the Commonwealth of Massachusetts. During that same period of time, Respondent performed services within the Commonwealth of Massachusetts valued in excess of $50,000 for enterprises which were directly engaged in interstate commerce. The Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

For some or all of the period involved here, Respondent maintained a second facility, known as Harding Auto Glass Company, Inc., at a separate nearby location. Respondent stipulated, for the purposes of this case only, that it and Harding Auto Glass Company, Inc. constituted a single employing entity.

The complaint alleges, Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. Background

The Employer and the Union have had a long-standing collective-bargaining relationship wherein the Union has represented Respondent's employees in two units, one of glaziers and another of glassworkers. The most recent agreements ran from November 2, 1991, to October 16, 1993. Respondent is the last unionized glass company in the Worcester area and the only one west of the Boston area. Mark Goldstein is Respondent's president. James Farmer is the Union's business manager.

In October, Respondent had three glassworkers, Dana Whitney, Roger Demers, and Robert Mosely, and two glaziers, James Tritone and Charles Jones. The glassworkers repaired and replaced automobile glass, cut glass, and fabricated metal. They sometimes assisted the more highly skilled, and more highly paid, glaziers, who could repair, fabricate,

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The appropriate unit for glaziers consists of all glaziers employed by Respondent performing the work described in the preamble of the Glaziers Agreement between Glass Employers Group of Greater Boston, Inc. and the Union, which expired on October 16, 1993.

The appropriate unit for glassworkers consists of all glassworkers employed by the Respondent as described in art. III of the Glassworkers Agreement between Glass Employers Group of Greater Boston, Inc. and the Union, which expired on October 16, 1993.

and install storefronts and install windows in new commercial construction.

B. The Negotiations

On June 30, Goldstein notified Farmer that Harding Glass desired to negotiate its new agreements separately from the Glass Employers Association. Farmer responded, terminating the existing agreements on their expiration date, October 16, and indicating a willingness to meet and bargain. Goldstein proposed that negotiations begin in early October; the first meeting was held on October 8.

Goldstein, Farmer, and Business Representative Joe Guliano met at a coffeeshop on the afternoon of October 8 for the initial bargaining session. Goldstein laid out his concerns; as the only union glass shop in the Worcester area, Harding Glass was not competitive, he asserted. In particular, he complained about the wages and benefits of the glaziers, which totaled over $30 per hour. The Union made no specific offer but suggested that Goldstein was not taking advantage of several provisions of the existing agreements, provisions which would permit him to use the lower paid glassworkers to do more of the work which Respondent was paying glaziers to do and allow him to pay a reduced wage rate (80 percent of their wage rate) under the market recovery program to the glaziers when they worked on open shop projects. Goldstein recalled Farmer criticizing the way he ran his business, in particular the size of his office staff. He also recalled Farmer suggesting that he eliminate his glaziers, continuing his busi-

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Farmer apparently said this to Goldstein on several occasions during the brief course of the negotiations.

ness with lower paid glassworkers. Goldstein maintained that this was impractical and unsafe. The meeting ended with an agreement to meet again; no date was established.

On October 12, Goldstein asked, in writing, to "meet one more time to discuss my position with an effort to reach an agreement." Farmer agreed to meet, but again, no date was set. Goldstein responded with a letter, dated October 13, setting out his positions. He proposed a 1-year agreement which included provisions to reduce the glaziers' hourly wage rate from $22.05 to $13.73 per hour, raise the auto glass mechanics' pay by 50 cents (to a top rate for glassworkers of $13.73), eliminate all contributions to the health, welfare, pension, and annuity funds, substituting other health insurance and a promise to look into profit sharing, and include the glaziers in the vacation and holiday benefits of the glassworkers (which they did not previously receive), but with the elimination of the existing birthday and Christmas Eve holidays for everyone. He asked to meet as soon as possible, noting that the current agreement expired on October 16.

Goldstein and Farmer met again on October 14. Goldstein stated that he had to have what he had proposed in order to stay in business; Farmer protested that he was looking for a lot of givebacks, virtually everything that the glaziers had negotiated over the years, and stated that the glaziers would not agree to his proposal. He agreed to Goldstein's proposed wage rate for the glassworkers and suggested that Goldstein just sign a glassworkers' agreement. Then, if Respondent bid work requiring

glaziers, i.e., larger or prevailing wage jobs, the Union would provide them from the hall.

Farmer indicated that the Union could work with the health, welfare, pension, and annuity benefits as proposed by Goldstein. However, he noted that if contributions to the annuity fund ceased, the employees would lose those contributions which had already been made on their behalf. He suggested that some money be deducted from their wages to maintain annuity fund contributions. Goldstein promised to get back to Farmer on that issue.

On October 15, Goldstein rejected the Union's suggestion for taking the pension or annuity money from the wage package. He wrote that he did "not want to be faced with any potential contingent liability." Farmer's subsequent attempts to convince him that the funding was more than adequate to avoid any such liability were unavailing.

The Union held separate membership meetings for the glaziers and the glassworkers on October 17 to consider the contract offers of the employer association and those proposed by Respondent. Respondent's glaziers came to the meeting, were presented with Goldstein's proposal, noted that it appeared as if the Employer was seeking to get rid of them, and

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The essence of Farmer's proposal was that Respondent would be able to do all of its current work, except prevailing wage jobs, with employees designated and paid as glassworkers. It would not be permitted to retain the existing glaziers under a glaziers' agreement at the reduced rate, but would be permitted to hire anyone, including those who had formerly been glaziers or who possessed the requisite skills to perform the required work. While, as noted infra, this is what Respondent ultimately did, it appears that Respondent did not, or purported not to, so understand Farmer's proposal.

rejected it. In addition, they voted to strike and to establish a picket line. Respondent's glassworkers did not come to the meeting scheduled for their consideration of the glassworkers' contracts but agreed not to cross the glaziers' picket line.

On the conclusion of the meeting, the Union sent a facsimile message to Respondent, rejecting its offer. It stated, "We are ready and willing to continue negotiations" and asked that Goldstein indicate when he was available. The fax contained no reference to the strike vote. However, a picket line was set up on October 18 and no employees worked. Goldstein responded on October 20, indicating an availability to meet on either of the next 2 days.

They met again on October 22 or 23. As credibly related by Farmer and Guliano, the discussions revolved around making Respondent competitive while keeping the men working and maintaining a union relationship. Farmer reiterated and expanded on the earlier suggestions that Respondent utilize the market recovery rate and that it operate solely under a glassworkers' agreement, with those glassworkers being allowed to work on any jobs up to a contract value of $20,000, including that work which had previously been done by glaziers. On larger jobs, the Union would refer [glaziers, as needed. The wage increase for glassworkers, as proposed by Goldstein, which was the same as had been agreed to by the employer association, was accepted, and there was at least a tentative agreement with respect to the health and welfare benefits. There was discussion of eliminating the annuity but continuing some pension benefits; Farmer's testimony as to this was vague. Farmer did not offer to let Respondent employ the glaziers under the terms of the glassworkers' con-

tract but, as he explained, Respondent could have hired them, if they were willing, or anyone else, as glassworkers.

As Goldstein recalled the discussions, he insisted that he needed glaziers to operate his business and was never told that he could hire glaziers and pay them the glassworkers' rate. Goldstein continued to object to making pension fund contributions, asserting a fear of a future liability. Farmer made no wage proposal and, from Goldstein's point of view, had offered nothing to settle the strike.

Farmer and Guilano left that meeting feeling that agreement was close. Goldstein had just the opposite impression, believing that the Union was not going to make a proposal.

On October 23, Goldstein rejected what he deemed to be the Union's proposal, as unacceptable. In his testimony, he claimed that he was referring to the Union's verbal proposal that he use the 80-percent market recovery rate and get rid of his glaziers. In testifying further, he stated that he did not consider Farmer's suggestion to continue under the glassworkers' agreement, with a 50- cent raise for those employees as Goldstein had proposed, for all jobs up to $20,000, to be a proposal "because its an unworkable proposal." His type of business, he said, had to have glaziers. His faxed letter went on to state that he was implementing his last offer.

Following receipt of the October 23 letter, Farmer called Goldstein, told him that he was destroying the business his father had built, and suggested that they should sit down and work something out. Goldstein insisted that there was "nothing to work out."

C. Dealings with the Employees

About October 18, Goldstein had called Whitney, asking to meet with the inside glassworkers and threatening them with replacement if they failed to return to work. As Whitney recalled the conversation, Goldstein stated that he could not afford the Union, that he had to get rid of it because he could not make a profit or be competitive. This statement was a reiteration of statements repeatedly made to Whitney and other employees throughout the spring and summer. Both Charles Jones and Tritone credibly recalled Goldstein making statements to the effect that he would either get rid of the Union or close the doors (as recalled by Jones) or that he would not be able to stay in the Union if he had to continue paying the wages he was paying (as recalled by Tritone).

On October 18, Respondent hired James Waszkiewicz and James Gabrielle as glaziers. They had only limited experience; their duties included replacing small pieces of plate glass, cutting glass for tabletops, and doing some fabrication. Because of their limited experience, they were paid $11 per hour. Unlike the glassworkers' agreement, which provided a sliding scale of wages, depending on the grade to which an employee is assigned, the glaziers' contract contained no lower rate for less experienced employees. It did provide for an apprenticeship program,

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Goldstein acknowledged telling his employees that he was paying more than twice what his competition was paying and was unable to bid jobs and make a profit and admitted telling Tritone that he would not be able to stay in the Union if he had to pay union wages. He denied making statements about "getting out of" or "getting rid of" the Union. I find the mutually corroborative testimony of these employees more convincing than Goldstein's denials.

with a sliding scale, but participation in that program required union participation. Waszkiewicz and Gabrielle were not apprentices.

Goldstein and the inside glassworkers, Whitney, Demers, and Mosely, met on the same day that Goldstein rejected the Union's proposal, October 23. Goldstein told them that he needed them at work, showed them the proposal he had made to the Union, and said he was willing to give them the same terms. He repeated his threat to replace them if they failed to return.

The Union maintained its picket line and the glaziers did not return to work. However, Whitney, Demers, and Mosely resigned from the Union and returned to work on October 25. They were paid under the terms which Goldstein had offered the Union, a 50-cent raise and Blue Cross HMO health insurance but no contributions to the Union's health, welfare, pension, or annuity funds. Respondent's last contribution to those funds was for the month of October. The employees also lost two holidays. Goldstein subsequently hired another employee as a

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On direct examination, Whitney had testified to a statement by Goldstein to the effect that the offer "wasn't written in stone" and could be changed in discussions between them. He made no reference to any such offer in describing this conversation on cross-examination. Accordingly, while I find him to be a generally more credible witness than Goldstein, I find the evidence insufficient to warrant a conclusion that Respondent offered to engage in such direct dealing. I do find, based on Whitney's testimony, that these discussions were initiated by Goldstein.

Whitney testified that he resigned following his meeting with Goldstein because he knew that it was against union rules to work in a nonunion shop. He typed and mailed the letter himself; the language was Goldstein's.

glazier, paying him $13.73 per hour; Tritone returned to work in April, as a glazier, at that same rate.

On November 5, Goldstein spoke with Whitney, Mosely, and the two new employees, Gabrielle and Waszkiewicz, in the office, with his bookkeeper, Carol Hamilton, present. He told the employees that they had to get rid of the Union, that he could not afford the benefits and that, if they couldn't get rid of the Union, he would close down. He said that they should submit a letter stating that they no longer wanted to be represented by the Union. Hamilton typed that letter, using language provided by Goldstein, and everyone signed it in his presence.

After work that day, Goldstein spoke with Whitney at a pool hall across from the Employer's facility. He asked Whitney to come in early on Monday so that he could go to Boston and file a petition with the Labor Board. Whitney was told that he should be the one to do it because he was the senior employee and Goldstein promised him a raise to the foreman's rate (to replace Demers who had quit on November 5) when the Union was gone.

On Monday, November 8, Whitney punched in early. Goldstein drove him to a restaurant where Whitney waited while Goldstein took his daughter to school. Goldstein returned and they drove, in Goldstein's vehicle, to Boston. Along the way, they stopped at another restaurant where Goldstein gave Whitney a completed decertification petition and a second, blank, petition form. He told Whitney to copy the petition over; the signature list, which had been signed on Friday, was appended to it. They then got back in Goldstein's van and drove to the NLRB office in Boston. Whitney was dropped off at the donut shop across from the Federal building, with instructions to

go in and talk to the Board agent, while Goldstein drove around so as not to be seen. Whitney did as he was instructed, filed the petition, and met Goldstein after he had completed this task and the two men returned to Worcester. Whitney was paid for a full day's work.

After the initial unfair labor practice charges were filed, a Board agent attempted to contact Whitney, calling him at work. Goldstein told Whitney that he did not have to talk with the Board, that he did not need the aggravation; Whitney refused to give a statement. About a week later, that investigator appeared at Whitney's home in Gardner, Massachusetts. Whitney again refused to cooperate, expressing a fear for his job. When he returned to work the next day, Whitney told Goldstein of the agent's visit. Goldstein replied that the agent had spoken with him about an hour before appearing in Whitney's driveway and had asked Goldstein where Gardner was. Goldstein then told Whitney to "keep his mouth shut," say nothing to the Labor Board,

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Goldstein denied the foregoing account in its entirety. The detail contained in Whitney's account, together with his overall demeanor, the fact that two striking employees related conversations with Whitney, immediately after the petition was filed, substantiating aspects of that account, and Respondent's failure to adduce the testimony of the bookkeeper satisfy me that Whitney's testimony was truthful. I note, moreover, that Whitney's payroll records for November 8 show that he not only clocked in for a full 8 hours on that day, but that he also was on the clock for overtime. That Whitney's affidavit confused the location of the conversation concerning his signing of the resignation letter with the one about the filing of the petition does not, in my opinion, warrant a contrary conclusion.

and additionally told Whitney that if he pulled the petition, he wouldn't have a job.

D. Analysis

1. Section 8(a)(1)

Threats--Contrary to Respondent's contentions, I find that Goldstein did more than merely complain that the union wages made his business noncompetitive. He went further, repeatedly threatening, from early spring through late fall, that he would have to either get out of the Union or "close his doors." These statements went beyond lawful predictions of the economic consequences of continued union representation supported by objective facts. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). They were threats posing an unlawful alternative to the employees, either get rid of the Union or suffer the loss of their jobs. As such, they are coercive and violative of Section 8(a)(1). *Debber Electric*, 313 NLRB 1094, 1097 (1994); *Ideal Elevator Corp.*, 295 NLRB 347, 351 (1989).

An additional threat, coercive and in violation of Section 8(a)(1), occurred in December when Goldstein told Whitney that he would not have a job if he "pulled the petition."

Promises—I have credited Whitney's testimony and found that Goldstein promised him a raise, to the foreman's rate of $15.23, "when the Union was gone" in order to induce him to file the decertification petition. Such a promise violates Section 8(a)(1). *Yale*

I credit Whitney's account. I am constrained to comment that an investigative technique which reveals the identity of witnesses to a respondent jeopardizes both the investigation and the job security of those witnesses.

New Haven Hospital, 308 NLRB 363, 368-369 (1992). See also *Marriott Corp.*, 310 NLRB 1152 fn. 1 (1993). It is irrelevant that Whitney never got the raise or that he may have bragged about the raise he expected to receive.

Involvement in the Decertification Petition--The decision whether or not to decertify their Union and the responsibility to prepare and file a decertification petition belong solely to the employees. Other than to provide general information about the process on the employees' unsolicited inquiry, an employer has no legitimate role in that activity, either to instigate or to facilitate it. *Lee Lumber & Building Material*, 306 NLRB 408 (1992). An employer may not solicit its employees to circulate or sign decertification petitions and it may not threaten employees in order to secure their support for such petitions. *Caterair International*, 309 NLRB 869 (1992). An employer may not provide more than ministerial aid in the preparation or filing of the petition. *Pic Way Shoe Mart*, 308 NLRB 84 (1992).

Respondent went far beyond the above-stated limits. It solicited employee support for the decertification, backing that solicitation with threats, and it solicited, with the promise of a raise, one employee to file that petition in his own name. It then provided the form and the language for the petition, without any request by an employee that it do so, and provided both the time (on the clock) and transportation necessary to see that the petition was filed. Its conduct in this regard clearly interfered with rights reserved to the employees and violated Section 8(a)(1). The petition resulting from this conduct is, of course, tainted. *Tyson Foods*, 311 NLRB 552, 569 (1993); Lee Lumber, *supra*.

Interference with Board Proceedings--By advising an employee that he or she need not honor a Board subpoena, an employer violates Section 8(a)(1) because such conduct tends "to impede the Board in the exercise of its power to compel the attendance of witnesses in its proceedings" and tends, further, "to deprive employees of the vindication or their rights through the participation of witnesses in a Board proceeding." *Bobs Motors*, 241 NLRB 1236 (1979). See also *Windsor Castle Health Care Facilities*, 310 NLRB 579, 592 (1993). The Act's protections, moreover, extend beyond its formal proceedings and exist independent of the issuance of a subpoena. Employees have the right to assist the Board in its investigation of unfair labor practice charges; they have the right to have the Board conduct complete investigations of their charges without interference by the employer. The Board's "channels of information" must be maintained free from "employer intimidation of prospective complainants and witnesses." *NLRB v. AA Electric Co.*, 405 U.S. 117, 121, 123 (1972), quoting from *John Hancock Mutual Life Ins. Co. v. NLRB.*, 89 U.S. App. D.C. 261, 263, 191 F.2d 483, 485 (1951). See *Art Steel California, Inc.*, 256 NLRB 816, 821-822 (1981), and *Debber Electric, supra* at 1100.

In mid-December, and on several occasions prior thereto, when a Board agent sought to interview Whitney in reference to the decertification petition, Respondent told Whitney that he did not have to speak to that agent, that he should not talk to that agent, and that he should order the agent off of his property. Goldstein told him, further, that he should "keep his mouth shut" and threatened his job security if he "pulled the petition." I find that by such statements, Respondent impeded the Board in the

course of its investigatory functions and thereby interfered with the employees in the exercise of their statutory rights in violation of Section 8(a)(1).

2. Section 8(a)(5)

Respondent does not dispute that it unilaterally implemented what it deemed to be its final offer, changing pay rates, and fringe benefits. It raised the pay of the glassworkers, reduced the pay of the glaziers, eliminated health, welfare, pension, and annuity fund contributions, and changed the holiday and vacation benefits. For the most part, the changes took effect on and after October 23 and were consistent with Respondent's offer. However, for the two new glaziers, the wage changes were implemented on October 18. Those wage changes did not comport with what Respondent had offered the Union.

Unilateral changes are not unlawful under all circumstances. As the Board stated in *Taft Broadcasting*, 163 NLRB 475, 478 (1967), enfd. sub nom. Television Artists *AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968):

> An employer violates his duty to bargain if, when negotiations are sought or in progress, he unilaterally institutes changes in existing terms and conditions of employment. On the other hand, after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably encompassed within his pre-impasse proposals. [Citations omitted.]

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors. . . .

Application of the foregoing standards to the facts of this case leads me to conclude that there was no impasse reached here. Bargaining had only begun on October 8 and the parties had met but three times, for no more than a total of 3 hours. Respondent had proposed Draconian cuts, cuts warranting more extensive discussion that these truncated negotiations permitted. Contrary to Goldstein's opinion, the Union had made suggestions and proposals, major concessions which were intended to meet Respondent's needs. Significantly, although the Union was putting economic pressure on Respondent, negotiations continued during the strike and the Union had sought and not rejected further negotiations. There was agreement on the wages for glassworkers and on the elimination of contributions to most of the fringe benefit funds.

I view the Union's offer to permit Respondent to use glassworkers to perform all of the work of the glaziers except for work done on major projects as essential agreement to what Respondent had asked for with regard to the glaziers. Respondent's proposal was to reduce the pay of the glaziers by approximately 40 percent, paying them at the same wage as the class I glassworkers. The Union's proposal would have freed Respondent from all of the obligations of the glaziers' agreement, permitting it to hire whomever it could, including experienced glaziers, to

perform, under the glassworkers' agreement, virtually all of the work previously done under the two contracts. The limited exception pertained to larger jobs, those exceeding $20,000, for which the Union would provide him with glaziers, to be paid on the glaziers' scale. These would, by and large, be jobs requiring union scale and were not the market in which Respondent was competing.

I note that what the Union proposed is essentially what happened after Respondent implemented its proposal. The glaziers refused to accept Respondent's proposal and went on strike. Goldstein then hired others to work as glaziers, paying them at the rate he had offered for class I glassworkers, or less, and providing them with the benefits he had offered for both the glaziers and the glassworkers.

On October 23, the parties were in disagreement with respect to pension fund contributions but there is nothing in this record to suggest that their positions were fixed and immutable. There had not been enough discussion on the issue to have reached that point and the Union had not foreclosed further discussion of the issue.

Finally, I must take note of Respondent's other conduct and its attitude toward continued union recognition, Thus, while the General Counsel does not contend that Respondent bargained in bad faith, I cannot ignore Respondent's repeated statements, before, during, and after bargaining, that it not only had to have relief from union wages but that it intended to be free of any union obligations. I cannot ignore the fact that Respondent unilaterally determined what wages it would pay to Waszkiewicz and Gabrielle when it hired them on October 18 to do work coming under the glaziers' jurisdiction, wages

which comported with neither the terms of the just expired agreement nor those which Goldstein had proposed. Neither can I ignore Respondent's subsequent actions directed toward effectuation of its intention to eliminate the Union. Even if Respondent had bargained in good faith, he was predisposed to rush to a conclusion that an impasse had been reached. He apparently had so concluded after only one brief meeting, asking on October 12 only to "meet one more time to discuss my position with an effort to reach agreement."

There was, I find, no impasse. In the absence of impasse, Respondent's unilateral implementation of its last and only offer, breaches its duty to bargain in good faith and violates Section 8(a)(5) of the Act.

3. The strike

Respondent's employees commenced an economic strike on October 18. On that same date, Respondent commenced on a course of unilateral changes, changes which I have found occurred before any impasse in bargaining. Within 2 to 3 weeks, Respondent also began to undermine the Union's status among its employees, with threats, promises, and unlawful support and encouragement of a decertification petition. Such conduct, I must find, prolonged the strike, which continues to this date, and converted that strike to one which must be deemed an unfair labor practice strike.

CONCLUSIONS OF LAW

1. The following constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All glaziers employed by Respondent performing the work described in the preamble of the

Glaziers Agreement between Glass Employers Group of Greater Boston, Inc., and the Union, which expired on October 16, 1993.

All glassworkers employed by the Respondent as described in Article III of the Glassworkers Agreement between Glass Employers Group of Greater Boston, Inc., and the Union which expired on October 16, 1993.

2. By threatening employees with discharge and by promising them higher wages in order to discourage them from supporting or remaining members of the Union, by interfering in the Board's investigation of unfair labor practice charges, and by encouraging and assisting employees in the filing of a decertification petition, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By unilaterally changing the terms and conditions of employment of its employees without first bargaining to impasse with the Union, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The strike which began on October 18 was prolonged by Respondent's unfair labor practices and was converted to an unfair labor practice strike as of that same date.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be

ordered to cease and desist and to take affirmative action designed to effectuate the policies of the Act.

Having found that by implementing its last contract proposal in the absence of a valid impasse, thereby unilaterally and unlawfully changing the terms and conditions of employment of the employees in the appropriate units, I shall recommend that Respondent be required to restore the terms and conditions of employment which were in effect on October 18, 1993, and make its employees whole for any losses they experienced as a result of this unilateral action, with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

APPENDIX F

NATIONAL LABOR RELATIONS BOARD

Case 1-CA-31148, 1-CA-31158

HARDING GLASS COMPANY, INC. and GLAZIERS LOCAL 1044, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO

November 3, 1994

DECISION

Statement of the Case

Michael O. Miller, Administrative Law Judge: This case was tried in Boston, Massachusetts on July 13 and 14, 1994 based upon charges filed on November 23 and November 29, 1993[1] by Glaziers Local 1044, International Brotherhood of Painters & Allied Trades, AFL-CIO (the Union), as thereafter amended, and a consolidated complaint issued by the Regional Director of Region 1 of the National Labor Relations Board (the Board) on February 28, 1994, as thereafter amended. The complaint alleges that Harding Glass Company, Inc. (the Respondent or the Employer), violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by making threats and promises to discourage continued union adherence, by encouraging and assisting employees in the filing of a decertification petition, by interfering with the Board's investigation of unfair labor practice charges and by unilaterally implementing its

[1] All dates are 1993 unless otherwise indicated.

contract offer in the absence of a bona fide impasse in collective-bargaining. Respondent's timely filed answer denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction and Labor Organization Status

Preliminary Conclusions of Law

The Respondent, a corporation, is engaged in the wholesale and retail sale and installation of glass for automobiles and commercial and industrial buildings at its facility in Worcester, Massachusetts.[2] In the course and conduct of its business operations during the calendar year ending December 31, 1993, Respondent purchased and received goods and materials valued in excess of $ 50,000 which were shipped to it directly from points located outside the Commonwealth of Massachusetts. During that same period of time, Respondent performed services within the Commonwealth of Massachusetts valued in excess of $ 50,000 for enterprises which were directly engaged in interstate commerce. The Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[2] For some or all of the period involved herein, Respondent maintained a second facility, known as Harding Auto Glass Company, Inc., at a separate nearby location. Respondent stipulated, for the purposes of this case only, that it and Harding Auto Glass Company, Inc., constituted a single employing entity.

The complaint alleges, Respondent admits and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Unfair Labor Practices

A. Background

The Employer and the Union have had a long-standing collective-bargaining relationship wherein the Union has represented Respondent's employees in two units, one of glaziers[3] and another of glassworkers.[4] The most recent agreements ran from November 2, 1991 to October 16, 1993. Respondent is the last unionized glass company in the Worcester area and the only one west of the Boston area. Mark Goldstein is Respondent's president. James Farmer is the Union's business manager.

In October, Respondent had three glassworkers, Dana Whitney, Roger Demers and Robert Mosely, and two glaziers, James Tritone and Charles Jones. The glassworkers repaired and replaced automobile glass, cut glass and fabricated metal. They sometimes assisted the more highly skilled, and more highly paid, glaziers, who could repair, fabricate and install storefronts and install windows in new commercial construction.

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[3] The appropriate unit for glaziers consists of all glaziers employed by Respondent performing the work described in the preamble of the Glaziers Agreement between Glass Employers Group of Greater Boston, Inc., and the Union, which expired on October 16, 1993.

[4] The appropriate unit for glassworkers consists of all glassworkers employed by the Respondent as described in Article III of the Glassworkers Agreement between Glass Employers Group of Greater Boston, Inc., and the Union, which expired on October 16, 1993.

B. The Negotiations

On June 30, Goldstein notified Farmer that Harding Glass desired to negotiate its new agreements separately from the Glass Employers Association. Farmer responded, terminating the existing agreements upon their expiration date, October 16, and indicating a willingness to meet and bargain. Goldstein proposed that negotiations begin in early October; the first meeting was held on October 8.

Goldstein, Farmer and business representative Joe Guliano met at a coffee shop on the afternoon of October 8 for the initial bargaining session. Goldstein laid out his concerns; as the only union glass shop in the Worcester area, Harding Glass was not competitive, he asserted. In particular, he complained about the wages and benefits of the glaziers, which totaled over $ 30 per hour. The Union made no specific offer but suggested that Goldstein was not taking advantage of several provisions of the existing agreements, provisions which would permit him to use the lower paid glassworkers to do more of the work which Respondent was paying glaziers to do and allow him to pay a reduced wage rate (80% of their wage rate) under the market recovery program to the glaziers when they worked on open shop projects. Goldstein recalled Farmer criticizing the way he ran his business, in particular the size of his office staff.[5] He also recalled Farmer suggesting that he eliminate his glaziers, continuing his business with lower paid glassworkers. Goldstein maintained that this was impractical and unsafe. The

[5] Farmer apparently said this to Goldstein on several occasions during the brief course of the negotiations.

meeting ended with an agreement to meet again; no date was established.

On October 12, Goldstein asked, in writing, to "meet one more time to discuss my position with an effort to reach an agreement." Farmer agreed to meet, but again, no date was set. Goldstein responded with a letter, dated October 13, setting out his positions. He proposed a one year agreement which included provisions to reduce the glaziers' hourly wage rate from $ 22.05 to $ 13.73 per hour, raise the auto glass mechanic's pay by $ .50 (to a top rate for glassworkers of $ 13.73), eliminate all contributions to the health, welfare, pension and annuity funds, substituting other health insurance and a promise to look into profit sharing, and include the glaziers in the vacation and holiday benefits of the glassworkers (which they did not previously receive), but with the elimination of the existing birthday and Christmas Eve holidays for everyone. He asked to meet as soon as possible, noting that the current agreement expired on October 16.

Goldstein and Farmer met again on October 14. Goldstein stated that he had to have what he had proposed in order to stay in business; Farmer protested that he was looking for a lot of givebacks, virtually everything that the glaziers had negotiated over the years, and stated that the glaziers would not agree to his proposal. He agreed to Goldstein's proposed wage rate for the glassworkers and suggested that Goldstein just sign a glassworkers' agreement. Then, if Respondent bid work requiring glaziers, i.e., larger or prevailing wage jobs, the Union would provide them from the hall.[6]

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[6] The essence of Farmer's proposal was that Respondent would be able to do all of its current work, except prevailing

Farmer indicated that the Union could work with the health, welfare, pension and annuity benefits as proposed by Goldstein. However, he noted that if contributions to the annuity fund ceased, the employees would lose those contributions which had already been made on their behalf. He suggested that some money be deducted from their wages to maintain annuity fund contributions. Goldstein promised to get back to Farmer on that issue.

On October 15, Goldstein rejected the Union's suggestion for taking the pension or annuity money from the wage package. He wrote that he did "not want to be faced with any potential contingent liability." Farmer's subsequent attempts to convince him that the funding was more than adequate to avoid any such liability were unavailing.

The Union held separate membership meetings for the glaziers and the glassworkers on October 17, to consider the contract offers of the employer association and those proposed by Respondent. Respondent's glaziers came to the meeting, were presented with Goldstein's proposal, noted that it appeared as if the employer was seeking to get rid of them, and rejected it. In addition, they voted to strike and to establish a picket line. Respondent's glassworkers did not come to the meeting scheduled for their

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wage jobs, with employees designated and paid as glassworkers. It would not be permitted to retain the existing glaziers *under a glaziers' agreement* at the reduced rate, but would be permitted to hire anyone, including those who had formerly been glaziers or who possessed the requisite skills, to perform the required work. While, as noted infra, this is what Respondent ultimately did, it appears that Respondent did not, or purported no to, so understand Farmer's proposal.

consideration of the glassworker contracts but agreed not to cross the glaziers' picket line.

Upon the conclusion of the meeting, the Union sent a facsimile message to Respondent, rejecting its offer. It stated, "We are ready and willing to continue negotiations" and asked that Goldstein indicate when he was available. The fax contained no reference to the strike vote. However, a picket line was set up on October 18 and no employees worked. Goldstein responded on October 20, indicating an availability to meet on either of the next two days.

They met again on October 22 or 23. As credibly related by Farmer and Guliano, the discussions revolved around making Respondent competitive while keeping the men working and maintaining a union relationship. Farmer reiterated and expanded upon the earlier suggestions that Respondent utilize the market recovery rate and that it operate solely under a glassworkers' agreement, with those glassworkers being allowed to work on any jobs up to a contract value of $ 20,000, including that work which had previously been done by glaziers. On larger jobs, the Union would refer glaziers, as needed. The wage increase for glassworkers, as proposed by Goldstein, which was the same as had been agreed to by the employer association, was accepted, and there was at least a tentative agreement with respect to the health and welfare benefits. There was discussion of eliminating the annuity but continuing some pension benefits; Farmer's testimony as to this was vague. Farmer did not offer to let Respondent employ the glaziers under the terms of the glassworkers contract but, as he explained, Respondent could have hired them, if they were willing, or anyone else, as glassworkers.

As Goldstein recalled the discussions, he insisted that he needed glaziers to operate his business and was never told that he could hire glaziers and pay them the glassworkers' rate. Goldstein continued to object to making pension fund contributions, asserting a fear of a future liability. Farmer made no wage proposal and, from Goldstein's point of view, had offered nothing to settle the strike.

Farmer and Guilano left that meeting feeling that agreement was close. Goldstein had just the opposite impression, believing that the Union was not going to make a proposal.

On October 23, Goldstein rejected what he deemed to be the Union's proposal, as unacceptable. In his testimony, he claimed that he was referring to the Union's verbal proposal that he use the 80% market recovery rate and get rid of his glaziers. In testifying further, he stated that he did not consider Farmer's suggestion to continue under the glassworkers' agreement, with a $ .50 raise for those employees as Goldstein had proposed, for all jobs up to $ 20,000, to be a proposal "because its an unworkable proposal." His type of business, he said, had to have glaziers. His faxed letter went on to state that he was implementing his last offer.

Following receipt of the October 23 letter, Farmer called Goldstein, told him that he was destroying the business his father had built, and suggested that they should sit down and work something out. Goldstein insisted that there was "nothing to work out."

C. Dealings with the Employees

About October 18, Goldstein had called Whitney, asking to meet with the inside glassworkers and

threatening them with replacement if they failed to return to work. As Whitney recalled the conversation, Goldstein stated that he could not afford the Union, that he had to get rid of it because he could not make a profit or be competitive. This statement was a reiteration of statements repeatedly made to Whitney and other employees throughout the spring and summer. Both Charles Jones and Tritone credibly recalled Goldstein making statements to the effect that he would either get rid of the Union or close the doors (as recalled by Jones) or that he would not be able to stay in the Union if he had to continue paying the wages he was paying (as recalled by Tritone).[7]

On October 18, Respondent hired James Waszkiewicz and James Gabrielle, as glaziers. They had only limited experience; their duties included replacing small pieces of plate glass, cutting glass for table tops and doing some fabrication. Because of their limited experience, they were paid $ 11 per hour. Unlike the glassworker agreement, which provided a sliding scale of wages, depending on the grade to which an employee is assigned, the glazier contract contained no lower rate for less experienced employees. It did provide for an apprenticeship program, with a sliding scale, but participation in that program required union participation. Waszkiewicz and Gabrielle were not apprentices.

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[7] Goldstein acknowledged telling his employees that he was paying more than twice what his competition was paying and was unable to bid jobs and make a profit and admitted telling Tritone that he would not be able to stay in the Union if he had to pay union wages. He denied making statements about "getting out of" or "getting rid of" the Union. I find the mutually corroborative testimony of these employees more convincing than Goldstein's denials.

Goldstein and the inside glassworkers, Whitney, Demers and Mosely, met on the same day that Goldstein rejected the Union's proposal, October 23. Goldstein told them that he needed them at work, showed them the proposal he had made to the Union and said he was willing to give them the same terms. He repeated his threat to replace them if they failed to return.[8]

The Union maintained its picket line and the glaziers did not return to work. However, Whitney, Demers and Mosely resigned from the Union and returned to work on October 25.[9] They were paid under the terms which Goldstein had offered the Union, a $ .50 raise and Blue Cross HMO health insurance but no contributions to the Union's health, welfare, pension or annuity funds. Respondent's last contribution to those funds was for the month of October. The employees also lost two holidays. Goldstein subsequently hired another employee as a glazier, paying him $ 13.73 per hour; Tritone returned to work in April, as a glazier, at that same rate.

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[8] On direct examination, Whitney had testified to a statement by Goldstein to the effect that the offer "wasn't written in stone" and could be changed in discussions between them. He made no reference to any such offer in describing this conversation on cross-examination. Accordingly, while I find him to be a generally more credible witness than Goldstein, I find the evidence insufficient to warrant a conclusion that Respondent offered to engage in such direct dealing. I do find, based upon Whitney's testimony, that these discussions were initiated by Goldstein.

[9] Whitney testified that he resigned following his meeting with Goldstein because he knew that it was against union rules to work in a nonunion shop. He typed and mailed the letter himself; the language was Goldstein's.

On November 5, Goldstein spoke with Whitney, Mosely and the two new employees, Gabrielle and Waszkiewicz, in the office, with his bookkeeper, Carol Hamilton, present. He told the employees that they had to get rid of the Union, that he could not afford the benefits and that, if they couldn't get rid of the Union, he would close down. He said that they should submit a letter stating that they no longer wanted to be represented by the Union. Hamilton typed that letter, using language provided by Goldstein, and everyone signed it in his presence.

After work that day, Goldstein spoke with Whitney at a pool hall across from the employer's facility. He asked Whitney to come in early on Monday so that he could go to Boston and file a petition with the Labor Board. Whitney was told that he should be the one to do it because he was the senior employee and Goldstein promised him a raise to the foreman's rate (to replace Demers who had quit on November 5) when the Union was gone.

On Monday, November 8, Whitney punched in early. Goldstein drove him to a restaurant where Whitney waited while Goldstein took his daughter to school. Goldstein returned and they drove, in Goldstein's vehicle, to Boston. Along the way, they stopped at another restaurant where Goldstein gave Whitney a completed decertification petition and a second, blank, petition form. He told Whitney to copy the petition over; the signature list, which had been signed on Friday, was appended to it. They then got back in Goldstein's van and drove to the NLRB office in Boston. Whitney was dropped off at the donut shop across from the Federal Building, with instructions to go in and talk to the Board agent, while Goldstein drove around so as not to be seen. Whitney did as he

was instructed, filed the petition, met Goldstein after he had completed this task, and the two men returned to Worcester. Whitney was paid for a full day's work.[10]

After the initial unfair labor practice charges were filed, a Board agent attempted to contact Whitney, calling him at work. Goldstein told Whitney that he did not have to talk with the Board, that he did not need the aggravation; Whitney refused to give a statement. About a week later, that investigator appeared at Whitney's home in Gardner, Massachusetts. Whitney again refused to cooperate, expressing a fear for his job. When he returned to work the next day, Whitney told Goldstein of the agent's visit. Goldstein replied that the agent had spoken with him about an hour before appearing in Whitney's driveway and had asked Goldstein where Gardner was. Goldstein then told Whitney to "keep his mouth shut," say nothing to the Labor Board and additionally told Whitney that if he pulled the petition, he wouldn't have a job.[11]

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[10] Goldstein denied the foregoing account in its entirety. The detail contained in Whitney's account, together with his overall demeanor, the fact that two striking employees related conversations with Whitney, immediately after the petition was filed, substantiating aspects of that account, and Respondent's failure to adduce the testimony of the bookkeeper satisfy me that Whitney's testimony was truthful. I note, moreover, that Whitney's payroll records for November 8 show that he not only clocked in for a full eight hours on that day, but that he also was on-the-clock for overtime. That Whitney's affidavit confused the location of the conversation concerning the his signing of the resignation letter with the one about the filing of the petition does not, in my opinion, warrant a contrary conclusion.

[11] I credit Whitney's account. I am constrained to comment that an investigative technique which reveals the identity of

D. Analysis

1. 8(a)(1)

Threats-Contrary to Respondent's contentions, I find that Goldstein did more than merely complain that the union wages made his business noncompetitive. He went further, repeatedly threatening, from early spring through late fall, that he would have to either get out of the union or "close his doors." These statements went beyond lawful predictions of the economic consequences of continued union representation supported by objective facts. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). They were threats posing an unlawful alternative to the employees, either get rid of the union or suffer the loss of their jobs. As such, they are coercive and violative of Section 8(a)(1). *Debber Electric*, 313 NLRB 1094, 1097 (1994); *Ideal Elevator Corp.*, 295 NLRB 347, 351 (1989).

An additional threat, coercive and in violation of Section 8(a)(1), occurred in December when Goldstein told Whitney that he would not have a job if he "pulled the petition."

Promises—I have credited Whitney's testimony and found that Goldstein promised him a raise, to the foreman's rate of $ 15.23, "when the Union was gone" in order to induce him to file the decertification petition. Such a promise violates Section 8(a)(1). *Yale New Haven Hospital*, 308 NLRB 363, 368-369 (1992); See also, *Marriott Corp.*, 310 NLRB 1152, fn.1 (1993). It is irrelevant that Whitney never got the raise or

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witnesses to the respondent jeopardizes both the investigation and the job security of those witnesses.

that he may have bragged about the raise he expected to receive.

Involvement in the Decertification Petition—The decision whether or not to decertify their union, and the responsibility to prepare and file a decertification petition, belong solely to the employees. Other than to provide general information about the process upon the employees' unsolicited inquiry, an employer has no legitimate role in that activity, either to instigate or to facilitate it. *Lee Lumber & Building Material*, 306 NLRB 408 (1992). An employer may not solicit its employees to circulate or sign decertification petitions and it may not threaten employees in order to secure their support for such petitions. *Caterair International*, 309 NLRB 869 (1992). An employer may not provide more than ministerial aid in the preparation or filing of the petition. *Pic Way Shoe Mart*, 308 NLRB 84 (1992).

Respondent went far beyond the above-stated limits. It solicited employee support for the decertification, backing that solicitation with threats, and it solicited, with the promise of a raise, one employee to file that petition in his own name. It then provided the form and the language for the petition, without any request by an employee that it do so, and provided both the time (on-the-clock) and transportation necessary to see that the petition was filed. Its conduct in this regard clearly interfered with rights reserved to the employees and violated Section 8(a)(1). The petition resulting from this conduct is, of course, tainted. *Tyson Foods*, 311 NLRB 552, 569 (1993); *Lee Lumber, supra*.

Interference with Board Proceedings—By advising an employee that he or she need not honor a Board subpoena, an employer violates Section 8(a)(1) be-

cause such conduct tends "to impede the Board in the exercise of its power to compel the attendance of witnesses in its proceedings" and tends, further, "to deprive employees of the vindication or their rights through the participation of witnesses in a Board proceeding." *Bobs Motors, Incorporated*, 241 NLRB 1236 (1979). See also, *Windsor Castle Health Care Facilities*, 310 NLRB 579, 592 (1993). The Act's protections, moreover, extend beyond its formal proceedings and exist independent of the issuance of a subpoena. Employees have the right to assist [*20] the Board in its investigation of unfair labor practice charges; they have the right to have the Board conduct complete investigations of their charges without interference by the employer. The Board's "channels of information" must be maintained free from "employer intimidation of prospective complainants and witnesses." *NLRB v. Scrivener, d/b/a AA Electric Co.*, 405 U.S. 117, 121, 123 (1972), quoting from *John Hancock Mutual Life Ins. Co., v. NLRB*. 89 U.S. App. D. C. 261, 263, 191 F.2d 483, 485 (1951). See *Art Steel California, Inc.*, 256 NLRB 816, 821-822 (1981) and *Debber Electric, supra*, at 1100.

In mid-December, and on several occasions prior thereto, when a Board agent sought to interview Whitney in reference to the decertification petition, Respondent told Whitney that he did not have to speak to that agent, that he should not talk to that agent and that he should order the agent off of his property. Goldstein told him, further, that he should "keep his mouth shut" and threatened his job security if he "pulled the petition." I find that by such statements, Respondent impeded the Board in the course of its investigatory functions and thereby interfered with the employees in the exercise of their statutory rights in violation of Section 8(a)(1).

2. 8(a)(5)

Respondent does not dispute that it unilaterally implemented what it deemed to be its final offer, changing pay rates and fringe benefits. It raised the pay of the glassworkers, reduced the pay of the glaziers, eliminated health, welfare, pension and annuity fund contributions and changed the holiday and vacation benefits. For the most part, the changes took effect on and after October 23 and were consistent with Respondent's offer. However, for the two new glaziers, the wage changes were implemented on October 18. Those wage changes did not comport with what Respondent had offered the Union.

Unilateral changes are not unlawful under all circumstances. As the Board stated in T*aft Broadcasting*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F. 2d 622 (D. C. Cir. 1968):

> An employer violates his duty to bargain if, when negotiations are sought or in progress, he unilaterally institutes changes in existing terms and conditions of employment. On the other hand, after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably encompassed within his pre-impasse proposals. [Citations omitted.]
>
> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the

> contemporaneous understanding of the parties as to the state of negotiations are all relevant factors. . . .

Application of the foregoing standards to the facts of this case leads me to conclude that there was no impasse reached here. Bargaining had only begun on October 8 and the parties had met but three times, for no more than a total of three hours. Respondent had proposed Draconian cuts, cuts warranting more extensive discussion that these truncated negotiations permitted. Contrary to Goldstein's opinion, the Union had made suggestions and proposals, major concessions which were intended to meet Respondent's needs. Significantly, although the Union was putting economic pressure on Respondent, negotiations continued during the strike and the Union had sought and not rejected further negotiations. There was agreement on the wages for glass workers and on the elimination of contributions to most of the fringe benefit funds.

I view the Union's offer to permit Respondent to use glassworkers to perform all of the work of the glaziers except for work done on major projects as essential agreement to what Respondent had asked for with regard to the glaziers. Respondent's proposal was to reduce the pay of the glaziers by approximately 40%, paying them at the same wage as the class I glassworkers. The Union's proposal would have freed Respondent from all of the obligations of the glazier agreement, permitting it to hire whomever it could, including experienced glaziers, to perform, under the glassworker agreement, virtually all of the work previously done under the two contracts. The limited exception pertained to larger jobs, those exceeding $ 20,000, for which the Union

would provide him with glaziers, to be paid on the glaziers' scale. These would, by and large, be jobs requiring union scale and were not the market in which Respondent was competing.

I note that what the Union proposed is essentially what happened after Respondent implemented its proposal. The glaziers refused to accept Respondent's proposal and went on strike. Goldstein then hired others to work as glaziers, paying them at the rate he had offered for class I glassworkers, or less, and providing them with the benefits he had offered for both the glaziers and the glassworkers.

On October 23, the parties were in disagreement with respect to pension fund contributions but there is nothing in this record to suggest that their positions were fixed and immutable. There had not been enough discussion on the issue to have reached that point and the Union had not foreclosed further discussion of the issue.

Finally, I must take note of Respondent's other conduct and its attitude toward continued union recognition, Thus, while General Counsel does not contend that Respondent bargained in bad faith, I cannot ignore Respondent's repeated statements, before, during and after bargaining, that it not only had to have relief from union wages but that it intended to be free of any union obligations. I cannot ignore the fact that Respondent unilaterally determined what wages it would pay to Waszkiewicz and Gabrielle when it hired them on October 18 to do work coming under the glaziers' jurisdiction, wages which comported with neither the terms of the just expired agreement nor those which Goldstein had proposed. Neither can I ignore Respondent's subsequent actions directed toward effectuation of its

intention to eliminate the Union. Even if Respondent had bargained in good faith, he was predisposed to rush to a conclusion that an impasse had been reached. He apparently had so concluded after only one brief meeting, asking on October 12 only to "meet one more time to discuss my position with an effort to reach agreement."

There was, I find, no impasse. In the absence of impasse, Respondent's unilateral implementation of its last and only offer, breaches its duty to bargain in good faith and violates Section 8(a)(5) of the Act.

3. The Strike

Respondent's employees commenced an economic strike on October 18. On that same date, Respondent commenced upon a course of unilateral changes, changes which I have found occurred before any impasse in bargaining. Within two to three weeks, Respondent also began to undermine the Union's status among its employees, with threats, promises and unlawful support and encouragement of a decertification petition. Such conduct, I must find prolonged the strike, which continues to this date, and converted that strike to one which must be deemed an unfair labor practice strike.

Conclusions of Law

1. The following constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All glaziers employed by Respondent performing the work described in the preamble of the Glaziers Agreement between Glass Employers Group of Greater Boston, Inc., and the Union,

which expired on October 16, 1993.

All glassworkers employed by the Respondent as described in Article III of the Glassworkers Agreement between Glass Employers Group of Greater Boston, Inc., and the Union which expired on October 16, 1993.

2. By threatening employees with discharge and by promising them higher wages in order to discourage them from supporting or remaining members of the Union, by interfering in the Board's investigation of unfair labor practice charges, and by encouraging and assisting employees in the filing of a decertification petition, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By unilaterally changing [*27] the terms and conditions of employment of its employees without first bargaining to impasse with the Union, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The strike which began on October 18 was prolonged by Respondent's unfair labor practices and was converted to an unfair labor practice strike as of that same date.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take affirmative action designed to effectuate the policies of the Act.

Having found that by implementing its last contract proposal in the absence of a valid impasse, thereby unilaterally and unlawfully changing the terms and conditions of employment of the employees in the appropriate units, I shall recommend that Respondent be required to restore the terms and conditions of employment which were in effect on October 18, 1993 and make its employees whole for any losses they experienced as a result of this unilateral action, with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[12]

ORDER

The Respondent, Harding Glass Company, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge and promising them higher wages in order to discourage them from supporting or remaining members of the Union, interfering with the

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Board in its investigation of unfair labor practice charges, and encouraging and assisting employees in the filing of a decertification petition.

(b) Unilaterally changing the terms and conditions of employment of its employees without first bargaining to impasse with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Restore all terms and conditions of employment to the status quo as it existed on October 18, 1993, before the unilateral changes were made, to the extent that such changes were detrimental to the employees.

(b) Make whole all employees who were detrimentally affected by the changes in terms and conditions of employment, with interest in the manner set forth in the Remedy section of this decision.

(c) Preserve and, upon request, make available to the Board or its agents for copying, all records and documents necessary to analyze and determine the amount owed to the employees and the union funds.

(d) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate units concerning terms and conditions of employment and, if agreements are reached, embody those agreements in writing:

All glaziers employed by Respondent per-

forming the work described in the preamble of the Glaziers Agreement between Glass Employers Group of Greater Boston, Inc., and the Union, which expired on October 16, 1993.

All glassworkers employed by the Respondent as described in Article III of the Glassworkers Agreement between Glass Employers Group of Greater Boston, Inc., and the Union which expired on October 16, 1993.

Post at its facility in Worcester, Massachusetts, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. November 3, 1994

Michael O. Miller, Administrative Law Judge

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[13] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX G

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
FIRST REGION

CASES 1-CA-31148
1-CA-31158

In the Matter of

HARDING GLASS CO., INC.,

and

INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES DISTRICT COUNCIL NO 35, (formerly GLAZIERS LOCAL 1044, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO).

STIPULATION CONSENTING TO AMOUNT OF BACKPAY, SCHEDULE FOR PAYMENT, ENTRY OF A SUPPLEMENTAL BOARD ORDER AND CONSENT JUDGMENT, AND FINAL RESOLUTION OF NLRB CASES 1-CA-31148 & 1-CA-31158

IT IS HEREBY STIPULATED AND AGREED, by and between Harding Glass Company, Inc. (Respondent), Painters & Allied Trades District Council No. 35, AFL-CIO, (the Union), and the Regional Director of the First Region of the National Labor Relations Board (Regional Director), collectively referred to herein as the Parties, that:

1. On March 31, 1995, the National Labor Relations Board (the Board), issued its Decision and

Order (316 NLRB 985) in Cases 1-CA-31148 and 1-CA-31158 directing Respondent, its officers, agents, successors and assigns, to take certain affirmative action, including that of restoring all terms and conditions of employment to the status quo as it existed on October 23, 1993, and making whole employees for any losses they may have suffered, as the result of the unilateral changes in the terms and conditions of employment made by Respondent in violation of Sections 8(a)(1) and (5) of the Act.

2. On March 27, 1996, the United States Court of Appeals for the First Circuit, in Case No. 95-1727, entered its judgment enforcing the Board's Order with respect, *inter alia*, to that portion of the Board's Order which directed Respondent to restore all terms and conditions of employment to the status quo as it existed on October 23, 1993, and to make whole employees for any losses they may have suffered as the result of the unilateral changes in the terms and conditions of employment made by Respondent in violation of Sections 8(a)(1) and (5) of the Act.

3. Because of the existence of controversies concerning the amount of backpay owed by Respondent to discriminatees Robert Mosely and James Tritone and others and to the Union Benefit Funds under the terms of the Board Order, as enforced in pertinent part, the Parties agree that the total amount of gross backpay and interest for the period through March 5, 2003 claimed to be owed by Respondent to the discriminatees Mosely and Tritone and their union benefit funds under the Board's Order referred to in paragraph 1 above, is a compromise amount of $50,000.00.

4. On March 5, 2003, the Parties further agreed that Respondent's monetary obligations for the back-

pay amounts, including interest, under the Board's Order, as enforced and affirmed, for the period through and including March 5, 2003, will be completely discharged by payments to discriminatees Robert Mosely of $16, 320.00 and to James Tritone of $1677.00 and by payment to Tritone's union annuity fund of $1720.00 and to Mosely's union pension fund of $30,283.00 as follows:

a. 10 calendar days after the date that the Board enters its Supplemental Order James Tritone will be paid $1677.00 in wages.

b. 10 calendar days after the date that the Board enters its Supplemental Order Robert Mosely will be paid $13,323.00 in wages.

c. This represents a total payment of $15,000.00 on the 10th calendar day after the date the Board enters its Supplemental Order

d. On April 5, 2004 Robert Mosely will be paid $2,997.00 in wages.

e. On April 5, 2004 James Tritone's union annuity fund will be paid $1720.00.

f. On April 5, 2004 Robert Mosely's union pension fund will be paid $1116,35.

g. This represents a total payment of $5833.35 on April 5, 2004.

h. Starting on April 5, 2005 and again on April 5, 2006, April 5, 2007, April 5, 2008, and April 5, 2009 Robert Mosely's union pension fund will be paid $5,833.33/yr.

5. Respondent agrees that, should it fail to timely make any of the payments referred to in paragraph 4 above, Respondent becomes responsible for the

immediate payment of entire amount of backpay due and owing to the discriminatees and/or their union benefits funds ($600,000) minus any payments that have been made, with additional interest owing from the date of default in accordance with the formula set forth in *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987).

6. The payments described in paragraph 4 above will be made payable to Mosely, Tritone and the Union Benefit Funds but will be remitted to the attention of the Regional Director who will be responsible to disburse these payments.

7. The Respondent shall commence compliance with all terms of this Stipulation immediately upon notification that the Regional Director and the Board have approved this Stipulation.

8. All parties hereto waive a compliance hearing, a decision of an Administrative Law Judge, the filing of exceptions and briefs, oral arguments before the Board, the making of findings of fact or conclusions of law by the Board, and all further and other proceedings to which the parties may be entitled under the Act or the Board's Rules and Regulations.

9. This Stipulation, the Board's Decision and Order referred to in paragraph 1 above, and the court judgment referred to in paragraph 2, shall constitute the entire record herein,

10. Upon this Stipulation and the entire record herein, as described in paragraph 9 above, and without any further notice of proceedings herein, the Board will enter a Supplemental Order forthwith providing that the Respondent, Harding Glass Co., Inc., its officers, agents, successors, and assigns, shall:

A. Take the following affirmative action to effectuate the policies of the National Labor Relations Act, as amended:

Make whole employees Robert Mosely in the amount of $16, 320.00 and James Tritone in the amount of $1677.00 and by payments of $1720.00 to Tritone's union annuity fund and $30,283.00 to Mosely's union pension fund as follows:

a. 10 calendar days after the date that the Board enters its Supplemental Order James Tritone will be paid $1877,00 in wages.

b. 10 calendar days after the date that the Board enters its Supplemental Order Robert Mosely will be paid $13,323.00 in wages.

c. This represents a total payment of $15,000 on the 10th calendar day after the date that the Board enters its Supplemental Order.

d. On April 5, 2004 Robert Mosely will be paid $2,997.00 in wages.

e. On April 5, 2004 James Tritone's union annuity fund will be paid $1720.00.

f. On April 5, 2004 Robert Mosely's union pension fund will be paid $1116.35.

g. This represents a total payment of $5833.35 on April 5, 2004.

h. Starting on April 5, 2005 and again on April 5, 2006, April 5, 2007, April 5, 2008, and April 5, 2009 Robert Mosely's union pension fund will be paid $5,833.33/yr.

B. If any payment is not paid in full on or before the date due as described paragraphs (a) through (h) above, Respondent will be responsible for imme-

diate payment of the entire $600,000 amount of backpay due and owing to the discriminatees and their union benefits funds, minus any payments that Respondent may already have made.

C. If Respondent fails to make the payments as described in paragraphs (a) through (h) above, after a five business day grace period, the Regional Director will notify Respondent in writing by mail and by fax of her intent to institute proceedings against Respondent for the collection of the full unpaid amount of backpay due and owing to discriminatees and/or their union benefits funds as set forth, above, minus any payments already made, with additional interest. If Respondent thereafter fails to make the yearly payment due within five business days of receipt of this notification, the Board may, without further notice, institute proceedings against Respondent for collection of the full indebtedness remaining due with additional interest owing on the unpaid amounts from the date of default in accordance with the formula set forth in *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987).

D. In the event that the Region, after due diligence, can not locate discriminates Robert Mosely than the total amount of wages due to him under this Agreement in the amount of $16, 320.00 will be paid to the Union Pension Fund on his behalf.

E. Respondent may, at any time and without penalty, pay any portion or part of the remaining balance ahead of the payment plan delineated in paragraph 4

11. Within ten (10) days of entry of the Board's Supplemental Order, the Respondent shall provide the Board with a security interest in all real property, fixtures, equipment, machinery, vehicles, inventory, accounts receivable, and bank accounts owned by Respondent; in the proceeds of such collateral; and, in all increases, substitutions, replacements, additions, and accessions to such collateral. To evidence such interest, the Respondent agrees to execute simultaneously herewith the attached Security Agreement. The Respondent shall be responsible for, and bear all expenses relating to, providing such security, including the recording thereof.

12. The United States Court of Appeals for any appropriate circuit may, upon application by the Board, enter its judgment enforcing the Supplemental Order of the Board, in the form set forth in paragraph 10 hereof. The Respondent waives all defenses to the entry of the judgment and its right to receive notice of the filing of an application for the entry of such judgment, provided that the judgment is in the words and figures set forth in paragraph 10 above. However, the Respondent shall be required to comply with the affirmative provisions of the Board's Supplemental Order after entryof the judgment only to the extent that it has not already done so.

13. This Stipulation contains the entire agreement between the parties, there being no agreement of any kind, verbal or otherwise, that varies, alters, or adds to it.

14. This Stipulation, together with the other documents constituting the record, as described in paragraph 9 above, shall be filed with the Board.

15. Provided that all payments required under this Stipulation are timely made, and Respondent otherwise complies with all of the terms of this Stipulation, compliance with the terms of this Stipulation constitutes final resolution of NLRB Cases 1-CA-31148 and 1-CA-31158.

Signed at Boston, Massachusetts
(City) (State)

HARDING GLASS COMPANY, INC.
By: Mark A. Goldstein (President)
(Name and Title)

166 Harding St.
(Address)

(508) 753-9019
(Fax number)

3/5/03
(Date)

Signed at_____
(City) (State)

INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES DISTRICT COUNCIL, NO. 35
BY: _____
(Name and Title)

_____
(Address)

_____
(Date)

Approval Recommended:'

_____

Elizabeth A. Vorro, Esq.
Karen E. Hickey, Esq.
National Labor Relations Board
Region One

_____

Date

APPROVED:

_____

Rosemary Pye, Regional Director
National Labor Relations Board
Region One

SECURITY AGREEMENT

Pursuant to the Stipulation Consenting to Amount of Backpay, Schedule for Payment, Entry of a Supplemental Board Order and Consent Judgment, and Final Settlement of NLRB Cases 1-CA-31148 and 1-CA-31158 dated March 5, 2003, Harding Glass Company, Inc. (Debtor) and the National Labor Relations Board (the Board), agree:

1. As collateral security for the payment of all monies due, or which may become due[1], under the Decision and Order of the Board 316 NLRB 985, as enforced by the U.S. Court of Appeals for the First Circuit in 95-1727, (NLRB Cases 1-CA31148 and 1-CA-31158), and the above-referenced Stipulation, and in consideration of the settlement of the pending litigation between the parties, Debtor grants to the Board a security interest in the following collateral owned by Debtor:

A. All real property;

B. All fixtures, equipment, machinery, vehicles, inventory, accounts receivable, and bank accounts;

C. All proceeds from the above collateral; and,

D. All increases, substitutions, replacements, additions and accessions to the above collateral.

2. Debtor shall provide the Board with written notice, to the Board's Regional Office in Boston, Massachusetts, within 10 calendar days thereof, of all material increases, substitutions, replacements,

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[1] The Board recognizes that the Commerce Bank and Trust will have the first priority security interest in the first S15,000 due and payable on April 5, 200S. The Board will retain a second priority security interest in that amount.

additions, and accessions to the above collateral; of any changes in the Debtor's place of business; and, of the opening of any new places of business, including businesses run by wholly owned subsidiaries.

3. To the extent applicable, the Uniform Commercial Code of the State in which the collateral is located shall govern the security interests provided for herein. Debtor shall take such steps and execute and deliver such financing statements, mortgages, and other documents required by the Code, other applicable laws, or as the Board may reasonably from time to time request.

4. Excepting security interests recorded prior to March 5, 2003, and the amount of $15,000 due on April 5, 2003 referenced in footnote one, Debtor shall not pledge, mortgage, create, or suffer to exist a security interest in any of the above collateral in favor of any party other than the Board or dispose of any of the above collateral without the prior written consent of the Board. This paragraph does not require the Debtor to obtain from the Board prior written consent in order to create a security interest in any of the above collateral that will be subordinate to the Board's interest.

5. Debtor shall make reasonable efforts to keep the collateral in good condition and repair, reasonable wear and tear excepted, and will permit the Board and its agents to inspect the collateral at any time. Debtor will insure the collateral against all hazards requested by the Board, in form and amount satisfactory to the Board. If Debtor fails to obtain insurance, the Board shall have the right to obtain it at Debtor's expense. Debtor assigns to the Board all right to receive proceeds of insurance not exceeding the unpaid balance due, directs any insurer to pay all

proceeds directly to the Board, and authorizes the Board to endorse any draft for the proceeds.

6. Debtor shall pay when due all taxes that are or may become a lien on the property and shall defend the collateral against the claims and demands of all persons. Debtor shall notify the Board in writing within 5 days after service on it of any summons or other process or notice issued in any action, suit, proceeding, or in which any judgment, decree order, or determination may affect or result in any lien or charge on any of the above collateral.

7. All reasonable advances, charges, costs, and expenses, including attorneys' fees, incurred or paid by the Board in exercising any right, power, or remedy conferred by this security agreement, or in the enforcement thereof, shall become part of the indebtedness secured hereunder and shall be paid to the Board by the Debtor immediately and without demand.

8. Upon default by Debtor in the performance of any covenant or agreement herein or in the discharge of its liability to the Board under the above-referenced Stipulation, the Board shall have all of the rights and remedies provided under the Uniform Commercial Code of Massachusetts, Federal Debt Collection Procedures Act of 1990 (28 U.S.C. 3201), or other applicable law and all rights provided herein, all of which rights and remedies shall, to the full extent permitted by law, be cumulative. The Board may require Debtor to assemble the collateral and make it available to the Board at a place to be designated by the Board that is reasonably convenient to the Board and Debtor. Any notice of sale, disposition, or other intended action by the Board, mailed and faxed to Debtor at the address shown on

the Board's records, at least 5 days prior to such action, shall constitute reasonable notice to Debtor. The waiver of any default hereunder shall not be a waiver of any subsequent default.

9. All obligations of Debtor hereunder shall bind its officers, agents, successors, and assigns, but does not impose personal financial obligations on the Respondent's officers and agents.

This agreement is executed on March 5, 2003.

NATIONAL LABOR RELATIONS BOARD
BY; /s/ [Illegible]

Harding Glass Company, Inc.
BY: /s/ Mark A. Goldstein
TITLE: President

G:/R01COM/Settlement/hardingglasssecurity.doc

APPENDIX H

[Logo] UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Region 1 Boston, Massachusetts
10 Causeway Street, 6th Floor
Boston, MA 02222-1072
(617) 565-6701 Fax (617) 565-6725
e-mail Claire.Powers@nlrb.gov

Tuesday, July 20, 2004

Robert Weihrauch, Esquire
466 Main Street, 20th Floor
Worcester, MA 01608

Fax: 508-799-0478

RE: Harding Glass Company, Inc.
1-CA-31148 and 1-CA-31158
316 NLRB 985 3131/95
95-1727(1st Cir.) 3/27/96
337 NLRB No. 175 8/1/02
02-2134 (1st Cir.) 11/25/02

Dear Mr. Weihrauch,

The purpose of this letter is to advise you that this office been informed that the proposed Formal Settlement Agreement is unacceptable to the Board. As a result, we will have to restructure the settlement to more closely follow the Supplemental Board Order, as enforced by the Court of Appeals, and casehandling requirements. As a result, we will be seeking a Settlement Agreement for the following individuals in the amounts set opposite their names and for payments due the Union on behalf of those individuals, including interest, as set forth in Attachment A.

I realize your client has issues with respect to the interim earnings and expenses of each of the employ-

ees and with respect to the status of James Triton. I would be glad to meet with you in order to review those concerns. If you can demonstrate that those concerns have merit, then the figures could possibly be amended.

I also realize the backpay is a significant amount for a small employer to pay. We would be seeking a time payment proposal supported by a security agreement and mortgage on real property. If your client maintains that it cannot work out appropriate time payments for this amount and or provide a security agreement and mortgage on real property, then your client should be prepared to demonstrate its inability to pay by submitting to an audit of its books.

Please contact me at 617-565-6701 to arrange to discuss your client's position on this matter. I am available to meet with you between Monday, August 9, and Thursday, August 19, 2004, here at the Boston Regional Office. Please contact me by the close of business Friday, August 6, 2004, to schedule a mutually agreeable time for us to meet.

If, on the other hand, your client is not interested in pursuing settlement, please advise me by the close of business Friday, August 6, 201)4, and the Region will schedule the date for hearing on those issues remanded by the Board.

I look forward to your continued cooperation. I trust that we will be able to resolve these matters in a timely fashion. Thank you for your prompt attention to this matter.

Very truly yours,

/s/ Claire L. Powers
CLAIRE L. POWERS
Compliance Officer

Attachment A

Discriminatee	Backpay	Payment to Funds on behalf of Discriminatee
Kenneth Bullock	3,777.91	15,602.40
Christopher Carle	4,139.26	27,616.33
David Elworthy	6,981.94	35,343.63
James Gabrielle	18,728.72	15,596.80
Christopher Pelletier	9,311.81	20,692.81
Robert F. Mosely	9,497.48	33,508.81
Richard A. Poirer	38,780.95	44,61538
Mark Zaltberg	975.89	1,027.11
Richard E. Von Mena	11,183.29	11,118.02
James Triton	0.00	9,419.04
Subtotal:	103,377.25	214,540.73
Total:		317,917.98

APPENDIX I

[Logo] UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Region 1 Boston, Massachusetts
10 Causeway Street, 6th Floor
Boston, MA 02222-1072
(617) 565-6701 Fax (617) 565-6725
e-mail Clake.Powers@nlrb.gov

October 30, 2007

Robert Weihrauch, Esquire
466 Main Street, 20th Floor
Worcester, MA 01608
Fax: 508-799-0478

RE: Harding Glass Company, Inc.
1-CA-31148 and 1-CA-31158
347 NLRB No. 102 (8/29/06)
No. 06-2540 (8/17/07)

Dear Mr. Weihrauch:

Based upon our discussion, I am writing you in connection with the Judgment of the United States Court of Appeals for the First Circuit which issued on August 17, 2007, in the above case enforcing the Board's Supplemental Decision and Order requiring Respondent to make payments to the individuals and funds listed below, with interest. To date, Respondent has taken no action, such as paying the full amount or entering into a payment plan. I understand that Respondent is now willing to enter into a payment plan.

On Wednesday, October 24, 2007, 1 met with bookkeeper Shirley Dano for the purpose of receiving the requested documents. With respect to #21 of the Financial Questionnaire, it is necessary for Respon-

dent to provide for each bank account, records, including statements, cancelled checks, and records of deposit for years 2007, 2006, 2005, 2004, 2003, 2002, and 2001. Please arrange to deliver these documents to the Regional Office by the close of business Friday, November 9, 2007. If originals are provided, the Region will review them and return them to Respondent.

With respect to the interest owed, I have updated the interest calculations through Friday, November 9, 2007:

Interest through

Name		Backpay	11/9/07	Total
Robert Mosely		$9,497,48	$9,118.35	$18,615.82
James Triton		$975,89	$970.12	$1,946.01
Richard Poirer		$70,345.89	$41,144.63	$111,490,51
James Gabrielle		$18,846.38	$14,888.72	$33,735.09
Richard VonMerta		$11,273.69	$8,047.79	$19,321.48
David Elworthy		$6,979.14	$5,222.14	$12,201.28
Mark Zaltberg		$0.00	$0.00	$0.00
Christopher Cade		$4,057.24	$2,709,73	$6,766.97
Christopher Pelletier		$16,191.19	$9,211.88	$25,403.07
Kenneth Bullock		$5,908.05	$3,522.19	$9,430.24
Subtotal:		$144,074.94	$94,835.54	$238,910.48

Interest through

Fund		Payments	11/9/07	Total
Health and Welfare Fund		$181,994.31	$145,680.67	$505,748.04
Pension Fund		$87,735,79		
Annuity Fund		$85,914.46		
Apprenticeship Fund		$4,422.81		
Subtotal:		$360,067.37	$145,680.67	$505,748.04
Total:		$504,142.31	$240,516.21	$744,658.52

Respondent can enter into a formal settlement in this case providing for a time payment plan requiring 60 quarterly payments of $12,500. Attached please find Attachment A Schedule of Payments, which incorporates the terms as described. The Region would require, as a condition of entering into such a settlement, a security agreement pledging goods, real estate, or other materials valued in the amount owed. If Respondent wishes to enter in to such an agreement, or wishes to propose an alternative payment plan, please contact me by the close of business Friday, November 9, 2007, so that we can discuss the terms and language of a formal settlement and appropriate collateral to secure its performance. Respondent should be prepared to enter into a Formal Settlement Agreement and to submit the first payment to this office by the close of business Friday, November 9. 2007.

Further formal action can be avoided by complying with the Court's Judgment in this matter. Please note that you should notify me by Friday, November 9, 2007, what steps Respondent has taken or intends to take in order to comply with the Judgment. If you have any questions, please write or telephone me and I will assist you in effectuating compliance.

If and when Respondent has fully complied with the affirmative terms of the Judgment and there are no reported violations of its negative provision, we shall notify you that the case has been closed on compliance.

In the event there is non-compliance with the terms of the Judgment, immediate consideration will be given to the institution of contempt proceedings or other appropriate actions.

Very truly yours,

/s/ Claire L. Powers
CLAIRE L. POWERS
Compliance Officer

Enclosures

cc: Harding Glass Company, Inc.
Attn: Mark Goldstein
162 Harding Street
Worcester, MA 01604

APPENDIX J

TITLE 29—LABOR

CHAPTER 7—LABOR-MANAGEMENT RELATIONS

SUBCHAPTER II—NATIONAL LABOR RELATIONS

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement,

whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce

(A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or

(B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159 (a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any

goods, articles, materials, or commodities or to perform any services; or

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159 (c) of this title,

(B) where within the preceding twelve months a valid election under section 159 (c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159 (c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159 (c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159 (a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate

period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible[1] and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

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[1] So in original. Probably should be "unenforceable".

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because

(1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or

(2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or

(3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or

(4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: Provided further,

That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159 (c) or 159 (e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

(July 5, 1935, ch. 372, § 8, 49 Stat. 452; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 140; Oct. 22, 1951, ch. 534, § 1(b), 65 Stat. 601; Pub. L. 86–257, title II, § 201(e), title VII, §§ 704(a)–(c), 705(a), Sept. 14, 1959, 73 Stat. 525, 542–545; Pub. L. 93–360, § 1(c)–(e), July 26, 1974, 88 Stat. 395, 396.)

Amendments

1974—Subsec. (d). Pub. L. 93–360, § 1(c), (d), substituted "any notice" for "the sixty-day" and inserted ", or who engages in any strike within the appropriate period specified in subsection (g) of this section," in loss-of-employee-status provision and inserted enumeration of modifications to this subsection which are to be applied whenever the collective bargaining involves employees of a health care institution.

Subsec. (g). Pub. L. 93–360, § 1(e), added subsec. (g).

1959—Subsec. (a)(3). Pub. L. 86–257, § 201(e), struck out "and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 159 (f), (g), (h) of this title" after "such agreement when made" in cl. (i).

Subsec. (b)(4). Pub. L. 86–257, § 704(a), among other changes, substituted "induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment" for "induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment" in cl. (i), added cl. (ii), and inserted provisions relating to agreements prohibited by subsection (e) of this section in cl. (A), the proviso relating to primary strikes and primary picketing in cl. (B), and the last proviso relating to publicity.

Subsec. (b)(7). Pub. L. 86–257, § 704(c), added par. (7).

Subsec. (e). Pub. L. 86–257, § 704(b), added subsec. (e).

Subsec. (f). Pub. L. 86–257, § 705(a), added subsec. (f).

1951—Subsec. (a)(3). Act Oct. 22, 1951, substituted "and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:" for "; and (ii) if, following the most recent election held as provided in section 159 (e) of this title the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:".

1947—Act June 23, 1947, amended section generally by stating what were unfair labor practices by a union as well as by an employer, and by inserting provisions protecting the right of free speech for both employers and unions.

Effective Date of 1974 Amendment

Amendment by Pub. L. 93–360 effective on thirtieth day after July 26, 1974, see section 4 of Pub. L. 93–360, set out as an Effective Date note under section 169 of this title.

Effective Date of 1959 Amendment

Amendment by sections 704 (a)–(c) and 705(a) of Pub. L. 86–257 effective sixty days after Sept. 14, 1959, see section 707 of Pub. L. 86–257, set out as a note under section 153 of this title.

Effective Date of 1947 Amendment

For effective date of amendment by act June 23, 1947, see section 104 of act June 23, 1947, set out as a note under section 151 of this title.

Agreements Requiring Membership in a Labor Organization as a Condition of Employment

Section 705(b) of Pub. L. 86–257 provided that: "Nothing contained in the amendment made by subsection (a) [amending this section] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law."

Unfair Labor Practices Prior to June 23, 1947

Section 102 of title I of act June 23, 1947, provided that: "No provision of this title [amending this subchapter] shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this act [June 23, 1947] which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a)(3) and section 8(b)(2) of the National Labor Relations Act as amended by this title [subsecs. (a)(3) and (b)(2) of this section] shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act [June 23, 1947], or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) [see subsec. (a)(3) of this section] of the National Labor Relations

Act prior to the effective date of this title [sixty days after June 23, 1947] unless such agreement was renewed or extended subsequent thereto."

TITLE 29—LABOR

CHAPTER 7—LABOR-MANAGEMENT RELATIONS

SUBCHAPTER II—NATIONAL LABOR RELATIONS

Sec. 160. Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a

notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28.

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or

hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or

judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Modification of findings or orders prior to filing record in court

Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such tempo-

rary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) Institution of court proceedings as stay of Board's order

The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title

When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by chapter 6 of this title.

(i) Repealed. Pub. L. 98-620, title IV, Sec. 402(31), Nov. 8, 1984, 98 Stat. 3360

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Hearings on jurisdictional strikes

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to

such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such tempo-

rary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

(m) Priority of cases

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l) of this section.

APPENDIX K

NATIONAL LABOR RELATIONS BOARD
(N.L.R.B.)

Cases 1-CA-31148 and 1-CA-31158

HARDING GLASS COMPANY, INC. and GLAZIERS LOCAL 1044, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO

August 1, 2002

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On March 31, 1995, the National Labor Relations Board issued a Decision and Order in this proceeding[1] in which it ordered the Respondent, Harding Glass Company, Inc., on request of the Union, to restore all terms and conditions of employment to the status quo as they existed on October 23, 1993, and make whole any employees for any losses they suffered as a result of the unilateral changes in terms and conditions of employment, with interest. In addition, the Board ordered the Respondent, on application, to offer immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, to all those employees who went on strike on October 18, 1993, and were not permanently replaced prior to October

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[1] 316 NLRB 985.

25, 1993, discharging if necessary any replacements hired on or after October 25, 1993.

On March 27, 1996, the United States Court of Appeals for the First Circuit entered a judgment enforcing the Board's Order, inter alia, directing the Respondent to restore all terms and conditions of employment to the status quo as it existed on October 23, 1993, and to make whole all employees, with interest, for any losses they may have suffered as a result of the unilateral changes in the terms and conditions of employment made by the Respondent in violation of Section 8(a)(1) and (5) of the Act.[2] The circuit court declined to adopt the Board's finding that the economic strike which began on October 18, 1993, was converted to an unfair labor practice strike on October 25, 1993, and, accordingly, denied enforcement to that portion of the Board's Order that required the Respondent to offer immediate and full reinstatement to all those employees who went on strike on October 18, 1993, and were not permanently replaced prior to October 25, 1993.

A controversy having arisen over the amount of backpay due the claimants under the Board's Order, the Regional Director for Region 1 issued a compliance specification and notice of hearing on July 1, 1997. On July 22, 1997, the Respondent filed its answer. Thereafter, on January 20, 2000, the Regional Director for Region 1 issued an amended compliance specification and notice of hearing, and on February 10, 2000, the Respondent filed its answer. The amended compliance specification sets forth backpay formulae and calculations for glassworkers

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[2] *NLRB v. Harding Glass Co.*, No. 95-1727 (unpublished opinion).

Robert Mosely, David Elworthy, Mark Zaltberg, Christopher Pelletier, Kenneth Bullock, and Christopher Carle, and glaziers James Tritone, James Gabrielle, Richard Poirer, and Richard Von Merta.

On March 10, 2000, the compliance officer for Region 1 advised the Respondent that its answer to the amended compliance specification, in part, failed to meet the requirements of Section 102.56(b) and (c) of the Board's Rules and Regulations, and that the General Counsel would file a Motion for Partial Summary Judgment if the Respondent did not file an appropriate amended answer by March 20, 2000. On March 21, 2000, the Respondent filed its first amended answer to the amended compliance specification.

On May 19, 2000, the General Counsel filed with the Board a motion to strike portions of Respondent's first amended answer to the amended compliance specification and for partial summary judgment. On May 23, 2000, the Board issued an order and Notice to Show Cause, transferring the proceeding to the Board and postponing indefinitely the hearing scheduled in this case. On June 6, 2000, the Respondent filed its opposition to the motion to strike and Motion for Partial Summary Judgment. The Respondent generally denies the General Counsel's formulae for computing backpay and the application of those formulae to the claimants. The Respondent also raises several affirmative defenses. The General Counsel argues that the Respondent's answers are substantively deficient under Section 102.56(b) and (c) of the Board's Rules and Regulations and that the Respondent's affirmative defenses are unsupported.

Ruling on Motion to Strike Portions of Respondent's First Amended Answer to the Amended Compliance Specification and for Partial Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulations state, in pertinent part:

> (b) Contents of answer to specification.—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.
>
> (c)Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specifi-

> cation to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

The General Counsel contends that the Respondent, in its answer, failed to comply with the specificity requirements of Section 102.56(b) of the Board's Rules and Regulations. We agree except as indicated below. Baker Electric, 330 NLRB 521 (2000). The Respondent failed to provide any explanation or figures in its amended answer to the first paragraph in the amended specification to support its claim that Robert Mosely was properly paid. Similarly, in its amended answer to the second paragraph of the amended specification, the Respondent: denied without elaboration that the alleged hourly rates of pay were applicable to the employees; and denied that Elworthy and Pelletier were glassworkers.

In this respect, we note that Section 102.56(b) of the Board's Rules, supra, specifies that as to all matters within the knowledge of a respondent, a general denial shall not be sufficient. Rather, if a respondent disputes the premises on which an allegation is based, the respondent's answer shall specifically state the basis for the respondent's disagreement with the allegation. Further, the answer shall set forth in detail the respondent's position as to the applicable premises.

Elworthy's and Pelletier's job classifications are obviously well within the Respondent's knowledge. Under Section 102.56(b), then, it is not enough for the Respondent generally to deny, without more, that Elworthy and Pelletier were glassworkers. To be sufficient under Section 102.56(b), the Respondent's flat denial of the job classifications alleged in the specification must be supported by a counterassertion from the Respondent as to what Elworthy's and Pelletier's job classifications in fact were, if not glassworkers. But the Respondent's answer makes no such counterassertion. Nor does it contain a statement of even the basis for the Respondent's disagreement with the job classifications alleged in the specification, much less a detailed statement of the Respondent's position as to the applicable premises on which the determination of the job classifications in question should be based. Accordingly, the Respondent's answer to the backpay specification in the instant case fails to support its general denials of the alleged job classifications of Elworth and Pelletier with affirmative counterassertions about what their job classifications actually were.[3]

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[3] Chairman Hurtgen would deny the General Counsel's Motion for Summary Judgement as to the status of Elworthy and Pelletier. The General Counsel alleges that these two employees were glassworkers whose wages were unilaterally changed. The Respondent specifically denies that they were glassworkers. Chairman Hurtgen would allow the Respondent an opportunity to prove that Elworthy and Pelletier were not glassworkers. He would not require the Respondent to prove what they were. That is irrelevant. It is sufficient to assert that they were not glassworkers.

Sec. 102.56(b), on which his colleagues rely, deals with backpay figures. By contrast, the issue here is simply whether Elworthy and Pelletier were glassworkers. The Respondent's denial here fairly raised that issue.

The Respondent also denied the gross backpay formula in its amended answer to the third paragraph of the amended specification, and the actual hours worked by, and the actual hourly rates paid to, the employees in its amended answer to the seventh paragraph of the amended specification. The Respondent provided neither an alternative formula nor alternative figures. Again, in its amended answer to the 10th paragraph of the amended specification, the Respondent provided no alternative formula for the total amount of fringe benefit contribution payments due on behalf of each employee to each of the four contractual benefit funds. Finally, in its amended answer to the amended specification's 12th through 21st paragraphs, which detail the amounts owed to each of the 10 employees, the Respondent again failed to provide specific alternative supporting figures.[4] Accordingly, we grant the General Counsel's Motion for Summary Judgment on these issues.

As to the status of Tritone, however, we shall deny the General Counsel's Motion for Summary Judgment and allow the parties to litigate this issue. The General Counsel alleges that Tritone was a glazier, that he should have been reinstated as a glazier, and that he was not so reinstated. The Respondent asserts that there was a legitimate basis for such nonreinstatement as a glazier, viz. that Tritone was physically unable to perform glazier work. We would

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[4] With respect to its amended answer to pars. 12, 14, 15, 17, 18, and 19, the Respondent points to some handwritten changes on the appendices to the amended specification. The Respondent neither explained these changes nor used them in alternative figures which were clearly explained. These changes therefore do no meet the requirements of Sec. 102.56(b) of the Board's Rules and Regulations. Baker Electric, *supra*.

give the Respondent an opportunity to prove this asserted fact.[5]

We disagree with our dissenting colleague on this matter. As noted above, the issue concerning employee Tritone is whether he should have been reinstated to a glazier position at glazier pay, as opposed to reinstatement to a lesser position at lower pay. The Respondent's answers to the original and amended compliance specifications said only that Tritone was "properly paid." We assume arguendo that this response was not sufficiently specific, i.e., it did not assert that Tritone was physically unable to perform glazier work. However, when the General Counsel moved for summary judgment on this basis, the Respondent timely responded with its specific defense, and attached thereto a letter of October 30, 1996, in which it specifically argued that Tritone could not physically perform glazier work. In these circumstances, we would not enter a default judgment against the Respondent and thereby deprive it of its right to litigate the issue.

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[5] Member Liebman would grant the General Counsel's Motion for Summary Judgment as to the status of Tritone. Tritone's job classification is within the Respondent's knowledge. In Member Liebman's view, it is not enough for the Respondent to generally deny that Tritone returned to work as a glazier. She would find no basis, in turn, for allowing the Respondent to seek to prove that Tritone was physically unable to perform glazier work. This contention was not raised in the Respondent's July 22, 1997 answer to the compliance specification and notice of hearing issued on July 1, 1997, or in the Respondent's February 10, 2000 answer to the amended compliance specification and notice of hearing issued on January 20, 2000. Rather, it was raised only in an October 30, 1996 letter from the Respondent's attorney. This assertion in a precompliance specification letter does not satisfy the requirements of Sec. 102.56 of the Board's Rules, *supra*.

We also agree with the General Counsel that the Respondent's affirmative defenses are without merit. The Respondent argues that the amended compliance specification should be dismissed in its entirety because of the delay in excess of 2 years between the date when the original compliance specification issued and the date the amended compliance specification issued. However, it is well established, that "laches may not defeat the action of a governmental agency in enforcing a public right," and, "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *Mid-State Ready Mix*, 316 NLRB 500 (1995), citing *Carrothers Construction Co.*, 274 NLRB 762, 763 (1985), and *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264 (1969).

The Respondent also argues that the amended specification fringe benefit contribution payments due on behalf of each employee to each of the four contractual benefit funds must be offset by the value of any alternative payments made by the Respondent. The Respondent further argues that the amended specification payments in this respect fail to benefit the employees, are unduly harsh on the Respondent, afford a windfall to the funds, and are punitive and inconsistent with the remedial purposes of the Act. However, it is well established that "[e]mployees have, in addition to a stake in receiving benefits negotiated on their behalf by their chosen representatives, a clear economic stake in the viability of funds to which part of their compensation is remitted." *Grondorf, Field, Black & Co.*, 318 NLRB 996, 997 (1995), enf. denied in pertinent part 107 F.3d 882 (D.C. Cir. 1997). Moreover, the wrongdoing employer should not benefit by having at its disposal

money which rightfully belonged to the contractual funds. Nor is the wrongdoing employer disadvantaged by receiving no offset for benefits provided through an employer sponsored alternative plan. Thus, "[A]n employer cannot complain of the extra cost of improperly created, substitute fringe benefits . . . The company is merely required to repay what it has unlawfully withheld . . . [I]t was the company that unlawfully chose to incur the additional expense of a private insurance program." *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983). *See also Banknote Corp. of America*, 327 NLRB 625 (1999).[6]

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[6] Chairman Hurtgen concurs. He does not pass on the validity of the D.C. Circuit's view in *Grondorf Field, Black & Co. v. NLRB, supra*. Assuming arguendo that the court's view is correct, there is no proffer of evidence showing an "improper windfall" here. That is, if there were a proffer of evidence showing that the Employer-Union plan provided no coverage to the employees during the period of the violation, a Board-ordered payment to the plan fund for that period would be, to that extent, a windfall to the fund. However, there is no such proffer of evidence, and thus there is no showing of the kind of windfall that concerned the court in *Grondorf*.

Contrary to his colleagues, Member Bartlett would permit the Respondent to present evidence at the compliance hearing, consistent with the D.C. Circuit's decision in *Grondorf, Field, Black & Co. v. NLRB, supra*, denying enf. of and remanding 318 NLRB 996 (1995), that its contributions to the contractual benefit funds should be reduced to avoid an improper windfall for those funds. Although the Board has not adopted the D.C. Circuit's view in *Grondorf*, allowing the Respondent to introduce such evidence into the record now would avoid a remand by the D.C. Circuit later, in the event the Respondent seeks court review of the Board's final decision. Further, a full factual record might assist the Board in evaluating whether to adopt the D.C. Circuit's view.

In sum, the Respondent's affirmative defenses are without merit, and we therefore grant the General Counsel's motion to strike them. In addition, the Respondent's amended answer to the designated paragraphs of the amended specification fails to comport with Board Rule 102.56(b). The General Counsel is therefore entitled to summary judgment on these matters under Board Rule 102.56(c). *Francis Building Corp.*, 330 NLRB No. 48 (1999) (not reported in Board volume.)

ORDER

IT IS ORDERED that the Respondent's affirmative defenses are stricken.

IT IS ALSO ORDERED that the General Counsel's Motion for Partial Summary Judgment is granted with respect to amended compliance specification paragraphs 1 through 10, and 12 through 21, relating to the backpay period and the backpay calculations for all the employees except as to the amount of interim earnings and expenses of each of the employees, and except as to the status of James Tritone.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 1 for the purpose of issuing a notice of hearing and scheduling the hearing before an administrative law judge, which shall be limited to taking evidence concerning the paragraphs of the amended compliance specification as to which summary judgment was not granted.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations

based on all of the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.